United States Court of Appeals

for the Second Circuit

APPENDIX

76-7468

United States Court of Appeals

For the Second Circuit.

B

P/S

H. C. WAINWRIGHT & CO., *Plaintiff-Appellee,*

against

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN, *Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES COURT OF APPEALS
FILED
FEB 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

(775)

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

H. C. WAINWRIGHT & Co.,

Plaintiff-Appellee,

against

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Docket Entries.

Date	Proceedings
07-09-76	Filed complaint and issued summons.
07-09-76	Filed Pltff's. affidavit & Order to Show Cause for a preliminary injunction & temporary restraining order, and Order appointing process servers, ret. 7-22-76 at 10:00 a.m. in Room 1903 .....Lasker, J.
07-13-76	Filed Pltff's. memorandum in support of order to show cause for a preliminary injunction.
07-12-76	Filed Pltff's. undertaking on injunction in the sum of $1,000—National Surety Corporation.
07-13-76	Filed summons & affidavit of service by Robert R. Cawthra. Served: Samuel A. Greenspoon on 7-9-76.
07-19-76	Filed Dfts: Affdvt. in opposition to motion for temp. injunction.
07-19-76	Filed Dfts. brief in opposition to motion for Temp. injunction.
07-21-76	Filed Supplemental Affdvt. of Roy L. Ragozin in support of preliminary injunction.
07-21-76	Filed Supplemental Affdvt. Robert L. Meyer in support of preliminary injunction.
07-21-76	Filed Reply Memorandum in support of pltffs. motion for preliminary injunction for copyright infringement & Unfair competition.

Docket Entries

Date	Proceedings
07-29-76	Filed Defts'. Answer to the complaint.
07-29-76	Filed Defts'. request for production of documents.
07-29-76	Filed Defts'. notice of taking deposition of Robert L. Meyer, *et al.* on dates indicated.
08-19-76	Filed Pltff's. notice of motion to strike Defts'. defenses, ret. 8-30-76.
08-19-76	Filed Pltff's. memorandum in support of motion to strike Defts'. second, third and sixth defenses.
08-19-76	Filed Pltff's. interrogs.
08-19-76	Filed Pltff's. request for admission under Rule 36.
08-19-76	Filed Opinion #44989—Pltff's. motion for a preliminary injunction is granted.....Lasker, J. (mailed notice)
08-20-76	Filed Order of Preliminary Injunction enjoining Defts. from further infringing on Pltff's copyright during the pendency of this action..... Lasker, J. (mailed notice)
08-30-76	Filed Defts'. affidavit & notice of motion for reargument of temporary injunction dated 8-19-76, ret. 9-9-76.
08-30-76	Filed Defts'. memorandum in support of motion for reargument.
08-31-76	Filed Pltff's. response to Defts'. request for production of documents.
09-07-76	Filed Defts'. brief in opposition to motion to dismiss defenses.
09-08-76	Filed Pltff's. affidavit by Robert L. Meyer in response to Defts'. motion for a stay pending appeal of the preliminary injunction.
09-08-76	Filed Pltff's. affidavit by Roy L. Regozin in response to Defts', motions for stay pending appeal and for modification of preliminary injunction.
09-08-76	Filed Pltff's. memorandum in response to Defts'. motions for reargument, stay pending appeal and modification of preliminary injunction.

Docket Entries

Date	Proceedings
09-09-76	Filed Pltff's. reply memorandum in further support of motion to strike Defts'. second, third & sixth defenses.
09-17-76	Filed Defts'. response to request for admission under Rule 36.
09-17-76	Filed Defts'. notice of appeal from the order entered on 8-19-76. (mailed notice)
10-01-76	Filed memo endorsed on motion dated 8-30-76. Motion denied & remainder disposed of discussion on the record. So Ordered, Lasker, J.
10-01-76	Filed answers (defts) to interrogs.
10-06-76	Filed notice that record has transmitted to the USCA.
10-12-76	Filed preliminary injunction restraining and enjoining defts from publishing, circulating *Wall Street Transcript* and requiring pltff to file bond in total of $5,000.00 within 5 days. Preliminary Inj. of 8-20-76 id rescinded. So Ordered Lasker J. (*infra*)
10-15-76	Filed Preliminary injunction bond in amt of 4,000.00 #2474971 (Fireman's fnd).
10-18-76	Filed bond for costs on appeal in amt of 250.00 (Crum & Foster)
10-06-76	Filed notice of transmission of record to USCA
10-18-76	Filed amended notice of appeal to USCA by defts from the order of 10-12-76 which superseded the preliminary inj of 8-20-76. (m/n)
10-19-76	Filed notice of filing of undertaking on Appeal.
11-22-76	Filed transcript of proceedings dated 10-1-76
11-29-76	Filed notice to docket clerk that 1st sup. record has been transmitted to USCA
12-01-76	Filed 2nd supplemental record to USCA
11-30-76	Filed stipulation ret supplementing record on appeal to U.S.C.A.

A True Copy.

RAYMOND F. BURGHARDT,
Clerk

By E. APONTE
Deputy Clerk

Summons.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

H. C. WAINWRIGHT & Co.,

Plaintiff,

v.

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Defendants.

Civil Action File No. 76-3053 MEL

To the above named Defendants:

You are hereby summoned and required to serve upon Cahill Gordon & Reindel plaintiff's attorneys, whose address is 80 Pine Street, New York, New York 10005, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT
Clerk of Court

s/ G. HARBESON
Deputy Clerk

[Seal of Court]

Date: New York, New York
July 9, 1976

Complaint for Copyright Infringement and Unfair Competition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiff H. C. Wainwright & Co. ("Wainwright") by its attorneys Cahill Gordon & Reindel, as and for its complaint, alleges as follows:

1. This action arises under the Copyright Act, 17 U.S.C. §§ 1 *et. seq., as amended,* (1970), as hereinafter more fully appears, with jurisdiction conferred by 28 U.S.C. §1338 (1970) and pendent jurisdiction.

2. Upon information and belief, defendant Wall Street Transcript Corporation was incorporated in 1963 under the laws of the State of New York, maintains its principal office at 120 Wall Street, New York, New York, and publishes "The Wall Street Transcript".

3. Upon information and belief, defendant Richard A. Holman resides at 470 West 24th Street, New York, New York, is and has been since 1963, Chairman, President, Chief Executive Officer, Director and sole stockholder of Wall Street Transcript Corporation and Editor and Publisher of "The Wall Street Transcript", and is primarily responsible for the conduct of the business of Wall Street Transcript Corporation.

4. Upon information and belief, defendant Wall Street Transcript Corporation and defendant Richard A. Holman each transact business in the Southern District of New York.

5. Wainwright, organized in 1868, is a Massachusetts limited partnership engaged primarily in the institutional research and brokerage business, and is registered as a

broker-dealer with the Securities and Exchange Commission pursuant to Section 15 of the Securities Exchange Act of 1934.

6. Wainwright derives approximately 90% of its revenues and typically an even greater percentage of its profits from its institutional research operation.

7. Wainwright's institutional research business has more than 900 clients, including most of the major banks, insurance companies, mutual funds, investments counselors, pension funds and similar institutional investors throughout the Free World. Wainwright provides these clients with continuous, in-depth analytical reports ("Research Reports") and services covering approximately 30 industrial areas and approximately 275 industrial, financial, utility and railroad corporations. Wainwright's Research Reports are designed to provide a comprehensive and objective analysis of company and industry characteristics, with particular emphasis on current and future business, operating, competitive, financial and managerial trends.

8. Wainwright prepares and distributes a variety of Research Reports, including Basic Reports and Special Reports. A Basic Report provides an in-depth study of a company with particular emphasis on current operations and the near-term and longer-range outlook, together with a review of the company's historical operating record. It contains sections concerning management, accounting policies, company and industry business characteristics, flow-of-funds and balance sheet analysis, and dividend policy. Basic Reports are based upon interviews with one or more company officials. A Special Report generally concerns a major development at a company.

9. The Research Reports are prepared by analysts who are employed by, or members of, Wainwright, each of whom specializes in one or more particular industries. From his research, the analyst develops conclusions concerning industry trends as well as business, operating, competitive, financial and managerial trends for specific companies engaged in the industry. The analyst sets forth his conclusions and the factual and analytical basis for them in Research Reports.

10. A Basic Report usually requires several months for the analyst to prepare. The time required to prepare a Special Report varies depending upon the nature of the developments discussed and the impact the analyst anticipates the developments will have on an industry or particular companies engaged in such industry.

FIRST COUNT

11. Wainwright repeats and realleges each and every allegation contained in paragraphs 1 through 10 inclusive of this Complaint with the same force and effect as if the same were set forth herein in full.

12. Prior to April 13, 1976, one of Wainwright's securities analysts, W. D. Williams, researched, created and wrote a Special Report dated April 13, 1976 concerning FMC Corp. (FMC). A copy of the Special Report is attached hereto as Exhibit A.

13. This Special Report contains a large amount of material wholly original with Wainwright and is copyrightable subject matter under the laws of the United States.

14. On April 13, 1976 Wainwright complied in all respects with the Copyright Act and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said Special Report, and subsequently received from the Register of Copyrights a certificate of registration, dated and identified as follows: "April 26, 1976, Class A, No. A. 736089". A copy of the Certificate is made a part of Exhibit A to the Complaint.

15. Since April 13, 1976 said Special Report has been published by Wainwright and all copies of it made available by Wainwright or under its authority have been printed and published in strict conformity with the provisions of the Copyright Act and all other laws governing copyright.

16. Since April 13, 1976 Wainwright has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said Special Report.

17. On or about May 10, 1976, defendants infringed said copyright by publishing and placing upon the market an abstract of said Special Report, consisting in its entirety of verbatim extracts from and paraphrases of Wainwright's Special Report. A copy of defendants' infringement is attached hereto as Exhibit B.

18. By letter dated May 27, 1976 Wainwright notified defendants that defendants had infringed the copyright of Wainwright in the Special Report, and defendants have continued to infringe the copyright. A copy of Wainwright's letter is attached hereto as Exhibit C.

19. After April 13, 1976 and continuously since about May 10, 1976, defendants have been publishing, selling and otherwise marketing their infringement and thereby engaging in misappropriation, unfair trade practice and

unfair competition against Wainwright to Wainwright's irreparable damage, for which there is no adequate remedy at law.

SECOND COUNT

20. Wainwright repeats and realleges each and every allegation contained in paragraphs 1 through 19 inclusive of this Complaint with the same force and effect as if the same were set forth herein in full.

21. Prior to April 27, 1976, one of Wainwright's securities analysts, Thomas A. Trantum, researched, created and wrote a Basic Report dated April 27, 1976 concerning Overnite Transportation (OT). A copy of the Basic Report is attached hereto as Exhibit D.

22. This Basic Report contains a large amount of material wholly original with Wainwright and is copyrightable subject matter under the laws of the United States.

23. On April 27, 1976 Wainwright complied in all respects with the Copyright Act and all other laws governing copyright, secured the exclusive rights and privileges in and to the copyright of said Basic Report, and subsequently received from the Register of Copyrights a certificate of registration, dated and identified as follows: "May 6, 1976, Class A, No. A741057." A copy of the Certificate is made a part of Exhibit D to the Complaint.

24. Since April 27, 1976 said Basic Report has been published by Wainwright and all copies of it made by Wainwright or under its authority or license have been printed and published in strict conformity with the provisions of the Copyright Act and all other laws governing copyright.

25. Since April 27, 1976, Wainwright has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said Basic Report.

26. On or about May 17, 1976, defendants infringed said copyright by publishing and placing upon the market an abstract of said Basic Report, consisting in its entirety of verbatim extracts from, and paraphrases of Wainwright's Special Report. A copy of defendants' infringement is attached hereto as Exhibit E.

27. By letter dated May 27, 1976 Wainwright notified defendants that defendants had infringed the copyright of Wainwright in the Basic Report, and defendants have continued to infringe the copyright. A copy of Wainwright's letter is attached hereto as Exhibit C.

28. After April 27, 1976, and continuously since about May 17, 1976, defendants have been publishing, selling and otherwise marketing their infringement and have thereby been engaging in misappropriation, unfair trade practices and unfair competition against Wainwright to Wainwright's irreparable damage, for which there is no adequate remedy at law.

THIRD COUNT

29. Wainwright repeats and realleges each and every allegation contained in paragraphs 1 through 28 inclusive of the Complaint with the same force and effect as if the same were set forth herein in full.

30. Prior to April 28, 1976, one of Wainwright's securities analysts, W. D. Williams, researched, created and wrote a Special Report concerning Monsanto Company (MTC). A copy of the Special Report is attached hereto as Exhibit F.

31. This Special Report contains a large amount of material wholly original with Wainwright and is copyrightable subject matter under the laws of the United States.

32. On April 28, 1976, Wainwright complied in all respects with the Copyright Act and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said Special Report, and subsequently received from the Register of Copyrights a certificate of registration, dated and identified as follows: "May 6, 1976, Class A. No. A 741057." A copy of the Certificate is made a part of Exhibit F to the Complaint.

33. Since April 28, 1976, said Special Report has been published by Wainwright and all copies of it made by Wainwright or under its authority or license have been printed and published in strict conformity with the provisions of the Copyright Act and all other laws governing copyright.

34. Since April 28, 1976, Wainwright has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said Special Report.

35. On or about May 24, 1976, defendants infringed said copyright by publishing and placing upon the market an abstract of said Special Report, consisting in its entirety of verbatim extracts from, and paraphrases of Wainwright's Special Report. A copy of defendants' infringement is attached hereto as Exhibit G.

36. By letter dated May 27, 1976, Wainwright notified defendants that defendants had infringed the copyright of Wainwright and defendants have continued to infringe the copyright. A copy of Wainwright's letter is attached hereto as Exhibit C.

37. After April 28, 1976, and continuously since about May 24, 1976, defendants have been publishing, selling and otherwise marketing their infringement and have thereby been engaging in misappropriation, unfair trade practices and unfair competition against Wainwright to Wainwright's irreparable damage, for which there is no adequate remedy at law.

FOURTH COUNT

38. Wainwright repeats and realleges each and every allegation contained in paragraphs 1 through 37 inclusive of the Complaint with the same force and effect as if the same were set forth herein in full.

39. Prior to April 30, 1976, one of Wainwright's securities analysts, Roy D. Burry, researched, created and wrote a Special Report concerning Eastman Kodak (EK) and Polaroid Corporation (PRD). A copy of the Special Report is attached hereto as Exhibit H.

40. This Special Report contains a large amount of material wholly original with Wainwright and is copyrightable subject matter under the laws of the United States.

41. On April 30, 1976, Wainwright complied in all respects with the Copyright Act and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said Special Report, and subsequently received from the Register of Copyrights a certificate of registration, dated and identified as follows: "May 6, 1976, Class A, No. 741073". A copy of the Certificate is made a part of Exhibit H hereto.

42. Since April 30, 1976, said Special Report has been published by Wainwright and all copies of it made by or under its authority or license have been printed and published in strict conformity with the provisions of the Copyright Act and all other laws governing copyright.

43. Since April 30, 1976, Wainwright has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said Special Report.

44. On May 27, 1976, Wainwright hand-delivered to defendants the letter referred to in paragraphs 17, 26 and 35 of the Complaint notifying defendants that they had infringed Wainwright's copyrighted reports concerning FMC Corp. (First Count herein), Overnite Transportation (Second Count herein), and Monsanto Company (Third Count herein). A copy of Wainwright's letter is attached hereto as Exhibit C.

45. Despite the notification by Wainwright on May 27, 1976 that certain copyrighted reports of Wainwright had been infringed by defendants, on or about May 31, 1976 defendants once again infringed a Wainwright copyright by publishing and placing upon the market an abstract of Wainwright's Special Report concerning Eastman Kodak and Polaroid Corporation, consisting in its entirety of verbatim extracts from, and paraphrases of, Wainwright's Special Report. A copy of defendants' infringement is attached hereto as Exhibit I.

46. After April 30, 1976, and continuously since about May 31, 1976, defendants have been publishing, selling and otherwise marketing this infringement and have thereby been engaging in misappropriation, unfair trade practices and unfair competition against Wainwright to Wainwright's irreparable damage, for which it has no adequate remedy at law.

FIFTH COUNT

47. Wainwright repeats and realleges each and every allegation contained in paragraphs 1 through 46 inclusive of the Complaint with the same force and effect as if the same were set forth herein in full.

48. Prior to June 15, 1976 one of Wainwright's securities analysts, Andrew C. Halvorsen, researched, created and wrote a Basic Report concerning C.I.T. Financial Corporation (CIT). A copy of the Basic Report is attached hereto as Exhibit J.

49. This Basic Report contains a large amount of material wholly original with Wainwright and is copyrightable subject matter under the laws of the United States.

50. On June 15, 1976 Wainwright complied in all respects with the Copyright Act and all other laws governing copyright, secured the exclusive rights and privileges in and to the copyright of said Basic Report, and filed an application for a certificate of registration with respect to the Basic Report. Wainwright has not as yet received the certificate of registration from the Register of Copyrights.

51. Since June 15, 1976, said Basic Report has been published by Wainwright and all copies of it made by or under its authority or license have been printed and published in strict conformity with the provisions of the Copyright Act and all other laws governing copyright.

52. Since June 15, 1976, Wainwright has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said Basic Report.

53. On June 23, 1976, Counsel for defendants telephoned Counsel for Wainwright and disclosed in the course of the conversation that he had drafted a summary of Wainwright's Basic Report concerning C.I.T. Financial Corporation.

54. By letter dated June 24, 1976 addressed to Counsel for defendants and delivered to his office by hand on that date, a signed copy of which was also delivered by hand

to the offices of defendants Wall Street Transcript Corporation and Richard A. Holman on that date, Counsel for Wainwright informed defendants that it was Wainwright's position that any summary published by defendants of a copyrighted Wainwright research report constitutes an infringement of Wainwright's copyright therein. The letter also gave express notice pursuant to Section 101(b) of the Copyright Act, 17 U.S.C. §101(b), that the summary of the Basic Report concerning C.I.T. Financial Corporation described by Counsel for defendants in the telephone conversation of June 23, 1976 would constitute an infringement of Wainwright's copyright therein. A copy of Wainwright's June 24, 1976 letter is attached hereto as Exhibit K.

55. Despite the notification by Wainwright's June 24, 1976 letter that a summary of Wainwright's Basic Report concerning C.I.T. Financial Corporation would constitute an infringement of Wainwright's copyright therein, on or about July 5, 1976 defendants infringed said copyright by publishing and placing upon the market an abstract of said Basic Report. A copy of defendants' infringement is attached hereto as Exhibit L.

56. After June 15, 1976 and continuously since about July 5, 1976, defendants have been publishing, selling and otherwise marketing their infringement of the Basic Report concerning C.I.T. Financial Corporation and have thereby been engaging in misappropriation, unfair trade practices and unfair competition against Wainwright to Wainwright's irreparable damage, for which it has no adequate remedy at law.

57. Despite notification by Wainwright to defendants that they had infringed Wainwright's copyrights in all of the Research Reports which are the subject of the First through Fifth Counts inclusive of this Complaint, defendants continue to infringe the copyrights.

WHEREFORE, Wainwright demands:

(1) That defendants, their agents, servants and employees and all persons acting in concert with them or on their behalf be enjoined during the pendency of this action and permanently from infringing said copyrights of Wainwright in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the abstracts attached hereto as Exhibits B, E, G, I and L or any other abstracts of copyrighted Wainwright Research Reports.

(2) That defendants be required to pay to Wainwright such damages as Wainwright has sustained in consequence of defendants' infringement of said copyrights and said misappropriation, unfair trade practices and unfair competition and to account for

> (a) all gains, profits and advantages derived by defendants, by said trade practices and unfair competition and
>
> (b) all gains, profits, and advantages derived by defendants by their infringement of Wainwright's copyrights or such damages as to the Court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars for each infringement.

(3) That defendants be required to deliver up to be impounded during the pendency of this action all copies of said abstracts in their possession or under their control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendants pay to Wainwright punitive damages.

(5) That defendants pay to Wainwright the costs of this action and reasonable attorney's fees to be allowed to Wainwright by the Court.

(6) That Wainwright have such other and further relief as is just.

Dated: New York, New York
July 9, 1976

CAHILL GORDON & REINDEL
By STEPHEN A. GREENE A Member of the Firm
Attorneys for Plaintiff H. C. Wainwright & Co.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

EXHIBIT A, ANNEXED TO COMPLAINT.

Certificate

FORM A

Registration of a Claim to Copyright in a published book manufactured in the United States of America

REGISTRATION NO. A 736089

DO NOT WRITE HERE

CLASS A

This Is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

NOT VALID WITHOUT COPYRIGHT OFFICE IMPRESSION SEAL

Barbara Ringer

Register of Copyrights
United States of America

1. Copyright Claimant(s) and Address(es):

Name H. C. WAINWRIGHT & CO.

Address 245 PARK AVENUE, NEW YORK, NEW YORK 10017

Name

Address

2. Title: FMC CORP. (FMC) - SPECIAL REPORT
(Title of book)

3. Authors:

Name H. C. WAINWRIGHT & CO. Citizenship U.S.A.
(Legal name followed by pseudonym if latter appears on copies) (Name of country)

Domiciled in U.S.A. Yes X No ____ Address 245 PARK AVE. NEW YORK, NEW YORK 10017

Name ____ Citizenship ____
(Legal name followed by pseudonym if latter appears on copies) (Name of country)

Domiciled in U.S.A. Yes ____ No ____ Address ____

Name ____ Citizenship ____
(Legal name followed by pseudonym if latter appears on copies) (Name of country)

Domiciled in U.S.A. Yes ____ No ____ Address ____

4. Date of Publication of This Edition:

April 13, 1976
(Month) (Day) (Year)

5. New Matter in This Version:

6. Book in English Previously Manufactured and Published Abroad: If all or a substantial part of the text of this edition was previously manufactured and published abroad in the English language, complete the following spaces:

Date of first publication of foreign edition ____ (Year)

Was registration for the foreign edition made in the U.S. Copyright Office? Yes ____ No ____

If your answer is "Yes," give registration number ____

EXAMINER

EXHIBIT A, ANNEXED TO COMPLAINT

7. Deposit account:

H. C. WAINWRIGHT & CO.

8. Send correspondence to:

Name ROBERT L. MEYER - H.C. WAINWRIGHT & CO. 245 PARK AVE., NEW YORK, N.Y. 10017

9. Send certificate to:

(Type or print name and address) Name ROBERT L. MEYER, H. C. WAINWRIGHT & CO.

Address 245 PARK AVENUE
(Number and street)

NEW YORK, NEW YORK 10017
(City) (State) (ZIP code)

Information concerning copyright in books

When to Use Form A. Form A is appropriate for published books which have been manufactured in the United States.

What Is a "Book"? The term "books" covers not only material published in book form, but also pamphlets, leaflets, cards, and single pages containing text. Books include fiction, nonfiction, poetry, collections, directories, catalogs, and information in tabular form.

Unpublished Books. The law does not provide for registration of "book" material in unpublished form. Unpublished books are protected at common law against unauthorized use prior to publication.

Duration of Copyright. Statutory copyright in published books lasts for 28 years from the date of first publication, and may be renewed for a second 28-year term.

How to secure statutory copyright in a book

First: Produce Copies With Copyright Notice. Produce the work in copies by printing or other means of reproduction. To secure copyright, it is essential that the copies bear a copyright notice in the required form and position, as explained below.

Second: Position the Work With Copyright Notice. The copyright law defines the "date of publication" as ". . . the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority. . . ."

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EXHIBIT A, ANNEXED TO COMPLAINT

H.C. WAINWRIGHT & CO.
Established 1868

SPECIAL REPORT

Earnings Estimate Revision
Fiber Division Sale, Tanker Contracts

April 13, 1976

FMC CORP. (FMC)

Earnings (Years ending Dec. 31)

Actual 1974	$2.40 per share(a)	Recent price	25
Actual 1975	3.24 per share(b)	1976 Price range to date	27-20
Estimated 1976	3.75 per share(c)	P-E based on 1976 estimate	7
Current annual dividend rate	1.00 per share	Yield	4.0%

(a) After 98¢ per share reduction from switch to LIFO, and tanker contract loss provision of 37¢ per share.

(b) Including LIFO profit of 20¢ per share and 12¢ per share benefit of change in pension funding assumptions.

(c) After possible further tanker loss provision of 25¢ per share.

Relative to our earlier expectations, FMC's 1975 results contained two surprising variations which, on balance, augur favorably for the company's performance this year. Though the single-figure estimate for 1976 remains at the $3.75 per share level to which it was increased (from $3.50) in mid-February, it is now based on even more conservative assumptions as to the forces likely to affect the business. These include a 25¢ per share allowance for further loss provision on the oil tanker contract; a charge of like amount had been incorporated in the writer's original projection of *1975* earnings but proved not to be required last year. The tanker problem is explored later in this report, as are the more important – and certainly more constructive – implications of the proposed sale of the company's fiber business.

The first of the "surprises" alluded to above that strengthen 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment. In contrast to the writer's earlier projection of a 14% year-to-year gain in results of this most important segment of FMC, group pretax income actually rose *60%*. Moreover, unlike certain other chemical companies last year, performance in this sector did not depend disproportionately on the ag line, which had only about a 15% gain in profits. Nevertheless, with (1) another excellent contribution assured this season from "Furadan," the company's highly successful broad-application insecticide-nematicide, (2) close to a full year's availability of the recent 40% expansion in natural soda ash capacity (together with substantial price increases thereon), and (3) improving demand across most of the company's chemical product spectrum, it seems clear not only that this segment will register another significant increase in earnings during 1976 but also that the gain will be from a much higher 1975 base than had earlier been presumed.

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The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year *despite the fact that the business had swung into the black beginning last September.* Although still lagging the company's budget, fibers have remained profitable so far in 1976. Even if demand for fibers in general has plateaued – and allowing for the impact of DuPont's recent steep cut in the price of polyester textile filament (of which FMC is a small producer) – it seems unlikely that this business will slip back into the red quickly or massively enough (if, indeed, it does so at all) for there not to be at least a very substantial reduction in fiber operating losses on a full-year basis in 1976. The writer believes that this operation will provide a positive swing of at least 25¢ to FMC's per share earnings. This assumes, of course, that current negotiations looking toward the sale of the Fiber Division do not produce a change in ownership status during 1976. If this business were to be sold and/or deconsolidated as of June 30, for example, there would be an additional favorable impact on year-to-year operating comparisons (before any write-offs) of perhaps 15¢ per share, assuming that our estimate of the trend and level of divisional profits is correct.

It should be noted that, in its Annual Report, FMC combines the pretax results of its Fiber and its Film Divisions, so that the preceding per share figures on fibers reflect the writer's estimates of not only the tax credit applicable to this segment but also the breakdown between the two divisions. It is believed that the Film Division, under the pressure of sharply lower demand (as customers reduced inventories) and price-cutting in foreign markets, slipped into the red last year. The extent of the operating deficit is unknown and, obviously, the greater its magnitude, the smaller the indicated loss in the Fibers Division and, presumably, the less the positive swing that can be projected in fibers this year.

The following table sets forth the writer's projections of each segment's operating results for 1976.

(See Table 1 on following page)

EXHIBIT A, ANNEXED TO COMPLAINT

Table I
FMC Estimates
(In millions)

	Sales	% Change	Group Income (Loss) Amount	% Change	Margin	Income Tax Amount	Rate	Net Income	Primary Per Share
1974 Actual (a)									
Machinery Group	$1,125	+15%	$ 54.0	– 33%	4.8%	$20.7	38.3%	$ 33.3	$0.91
Civilian	954	+24	34.1	– 37	3.6	12.3	36.0	21.8	0.55(d)(f)
Defense	171	–16	19.9	– 25	11.7	8.4	42.0	11.5	0.36
Chemical Group	$ 950	+27	$ 78.7	+ 52	N.A.	$14.5	N.A.	$ 64.2	$2.01
Industrial & Ag.	520	+37	88.4	+130	17.0	30.7	34.7	57.7	1.81
Fiber Div.	313	+18	(35.9)	–	–	18.7 cr	52.0 cr	(17.2)	(0.54)
Film Div.	117		5.5	–	4.7	2.5	45.5	3.0	0.09
Ketchikan (b)	–		10.5	+ 69	N.A.	N.A.	–	10.5	0.33
Petro-Tex (c)	–		10.2	+ 67	N.A.	N.A.	–	10.2	0.32
Corp. charges			(32.0)	+ 52	–	15.4 cr	48.0 cr	(16.6)	(0.52)
Total	$2,074	+21	$100.7	– 9	4.9%	$19.8(g)	19.7%	$ 80.9	$2.40
1975 Actual (h)									
Machinery Group	$1,356	+21%	$ 86.3	+ 60%	6.4%	$36.0	41.7%	$ 50.3	$1.44
Civilian	1,123	+18	56.3	+ 65	5.0	22.5	40.0	33.8	0.92(d)
Defense	233	+37	30.0	+ 51	12.9	13.5	45.0	16.5	0.52
Chemical Group	$ 936	– 1	$120.7	+ 53	N.A.	$34.0	N.A.	$ 86.7	$2.70
Industrial & Ag.	628	+21	141.4	+ 60	22.5	48.1	34.0	93.3	2.91
Fiber Div.	209	–33	(27.1)	–	–	13.6 cr	50.2 cr	(13.5)	(0.42)
Film Div.	99	–15	(1.0)	–	–	0.5 cr	50.0 cr	(0.5)	(0.02)
Ketchikan (b)	–		3.5	– 67	N.A.	N.A.	–	3.5	0.11
Petro-Tex (c)	–		3.9	– 62	N.A.	N.A.	–	3.9	0.12
Corp. charges	–		(55.4)	+ 73	–	26.6 cr	48.0 cr	(28.8)	(0.90)
Total	$2,292	+11	$151.6	+ 51	6.6%	$43.4(g)	28.6%	$108.2	$3.24
1976 Estimate									
Machinery Group	$1,472	+ 9%	$ 78	– 10%	5.3%	$33.7	43.2%	$ 44.3	$1.24
Civilian	1,215	+ 8	45	– 20	3.7	18.2	40.4	26.8	0.70(d)(f)
Defense	257	+10	33	+ 10	12.8	15.5	47.0	17.5	0.54
Chemical Group	$1,123	+20	$174	+ 44	N.A.	$61.4	N.A.	$112.6	$3.48
Industrial & Ag.	750	+19	170	+ 20	22.7	65.0	38.2	105.0	3.26
Fiber Div.	260	+25	(10)	–	–	5.0 cr	50.0	(5.0)	(0.16)
Film Div.	113	+14	3	–	2.7	1.4	45.0	1.6	0.05
Ketchikan (b)	–		5	+ 43	N.A.	N.A.	–	5.0	0.16
Petro-Tex (c)			6	+ 54	N.A.	N.A.		6.0	0.19
Corp. charges			(60)	+ 8		28.8 cr	48.0 cr	(31.2)	(0.97)
Total	$2,595	+13	$192	+ 27	7.4%	$66.3(g)	34.3%	$125.7	$3.75

(a) After reduction from switch to LIFO for all domestic non-fiber inventories – $31.5 million or 98¢ per share after taxes.

(b) FMC's 50% equity after taxes.

(c) FMC's 50% after-tax equity in Petro-Tex, plus undisclosed income from other, smaller affiliates.

(d) After $4.2 million preferred dividends, all allocated to machinery since this stock issued in the Link-Belt acquisition.

(f) After tanker contract loss provisions of $11.9 million or 37¢ per share after tax in 1974 and an estimated $8.0 million or 25¢ per share in 1976.

(g) After LIC of $7.1 million in 1974, $18.9 million in 1975, and $8 million in 1976, and DISC of $7.0 million in 1974, $9.1 million in 1975, and $7 million in 1976.

(h) Includes LIFO profit of $6.3 million or 20¢ per share after tax, and $3.9 million or 12¢ per share benefit of change in pension assumptions.

N.A. Not applicable.

Note Sales and group income are as reported for 1974 and 1975, all other figures are the writer's.

As is apparent from the preceding data, the company's bottom-line perf.rmance will be considerably retarded by a major resurgence in the tax rate from the abnormally low levels of the past two years. The investment credit (which FMC flows through) will reflect a hiatus in large-scale project completions between 1975's soda ash expansion and next year's start-up of a new "Furadan" plant; the ITC may accordingly be less than half last year's record 59¢ per share. The DISC credit, an important recent source of earnings for FMC, may also decline, though only modestly.

The Fiber Division Situation

Patently one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division (and FMC's 50% share of Ketchikan Pulp, the major raw material source for the rayon operation). The results achieved by the former American Viscose rayon and acetate business, extended subsequently by FMC into polyester, have followed a substantial if irregular downtrend since the cash purchase of that operation (for $114.5 million) in 1963. The record of the earnings contributions (partly estimated) of the Fiber and Film Divisions (plus Ketchikan) since 1968 is as follows:

F & F Contribution to FMC Earnings Per Share

'8	1969	1970	1971	1972	1973	1974	1975
8¢	58¢	32¢	16¢	19¢	22¢	(12¢)	(33¢)

( ) Denotes loss.

The record has actually been worse than this in fibers alone; the above numbers include the Film Division, which was quite profitable in 1974 (though it had a probably small loss last year), and FMC's 50% equity in Ketchikan Pulp, which had been a modest and relatively stable contributor up to 1974, when the extraordinarily favorable world pulp price situation then prevailing sparked a major jump in results. The Film Division is not included in the proposed disposal, but the Ketchikan interest is. Recent contribution of the for-sale components is estimated as follows:

	1973	1974	1975	Est. 1976
Fibers Division	0¢	(54¢)	(42¢)	(16¢)
Ketchikan equity	19	33	11	15
	19¢	(21¢)	(31¢)	(1¢)

( ) Denotes loss

The properties involved in the proposed disposal include two plants having capacities for roughly 370 million pounds of rayon staple and 60 million pounds of rayon tire cord, an 80-million pound acetate filament facility, and a location producing about 30 million pounds of polyester staple and 50 million pounds of polyester feeder yarn, roundly half of which FMC processes at a second site into textured yarn for warp knitting. Ketchikan Pulp is a medium-sized Alaskan producer of dissolving pulp (as well as some timber and lumber), about three-quarters of which go to FMC's cellulosic fiber and cellophane operations.

The net book value of the Fiber Division was about $120 million on December 31, 1975, while the book value of the 50% interest in Ketchikan was $38 million. There seems little doubt that any sale or disposal will involve a major writedown of these carrying values. Obviously, finding a buyer for at least the rayon and acetate lines – the major share of the total – will not be easy, since few believe that either type of fiber will show much, if any, growth on a long-range basis; furthermore, the rayon process creates expensive pollution-control problems, and raw material costs are likely to remain in a steep secular uptrend.

Moreover, at the present time, there are several material impediments to the sale of the Ketchikan interest – at least at a good price. First, there is the fact that FMC has only a half interest to sell – an inherent demerit for many potential purchasers other than Louisiana-Pacific, owner of the other 50%. Second, the Environmental Protection Agency is requiring installation (by July 1, 1977) of a secondary effluent treatment system that would cost $31 million. The partners have not as yet agreed to make this investment and are attempting to negotiate a more reasonable alternative with the EPA. Third, the District Court in Alaska has held that "clear cutting" is not permissible on U.S. Forest Service lands unless the trees are mature and the logging operator marks each tree to be cut. About 95% of the trees in the tract are mature, and meeting the court's requirement would be quite costly. (Apparently, the bureaucrats and lawyers have not considered the possibility of marking the trees that are *not* to be cut.) Finally, Ketchikan is a defendant in a number of antitrust and contract violation actions with a possible several-million-dollar total liability. The first two of these four "impediments" are considered significant by this observer.

Taking these and other considerations into account, and recognizing the large element of guesswork involved, the writer estimates that, if a single purchaser can be found for the Fiber Division and for the Ketchikan interest, FMC's proceeds and the associated writedown might approximate the following magnitudes:

	Fiber Division				
	Working Capital	Rayon/Acetate Plants	Polyester Plants	Ketchikan Equity	Total
Net book value (in millions)	$25	$35	$60	$38	$158
Possible sale price	35	0	40	25	100
Gain (loss)	$10	($35)	($20)	($13)	($ 58)

If proceeds can, in fact, be associated with segments of the Fiber Division's assets, the working capital portion probably would bring some gain since a substantial share of the net current assets is represented by pulp and finished fiber inventories at a low LIFO cost. As for the remainder, the writer has little confidence that his figures necessarily represent the most stringent assumptions – only what seems reasonably possible if the right buyer can be found.

Management is being exceedingly cautious in describing its objectives, timetable, strategy, etc. in this whole proceeding. Its reticence extends even to the matter of confirming or denying that approaches have been made to the appropriate Federal agencies to inquire about a

ruling* that might open the door to transfer of the properties to one or another of perhaps the most logical potential purchasers – American Enka (Akzona), Courtaulds, or Beaunit – the other three domestic rayon producers. (Ironically, Courtaulds built FMC's present rayon plants in the 1930's and sold them to American Viscose in 1941. Management has stated that it is attempting to find a single purchaser for the entire Fiber Division, with or without the Ketchikan equity, and, in the writer's opinion, this criterion might well limit the field of potential buyers to approximately the concerns just named.

Though lacking confirmation by management, this observer believes that if, for whatever reason, FMC cannot sell the Fiber Division as a unit, it is prepared to dispose of it piecemeal. The writer is also convinced that to the extent that any of the Division remains unsold beyond some undisclosed target deadline, FMC is prepared to walk away from the business. There is precedent for such an action in the company's October 1974 closing of the Parkersburg, West Virginia rayon plant. This unit, the oldest in the system, had capacity for 83 million pounds of staple and tow, plus 20 million pounds of regular tenacity rayon textile filament. (This shut-down of Parkersburg resulted in non-recurring costs of only 9¢ per share after tax.) Such a "last resort" course would throw approximately 5,000 people out of work and cause a severe shortage of rayon, of which FMC has accounted for about 55% of U.S. output; presumably these facts would weigh in the Federal Trade Commission's consideration of the merits of FMC's putative "distressed company" stance.

If a sale can be consummated roughly in line with the figures presented earlier, FMC would wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings. However, after-tax interest earnings on $100 million would exceed 15¢ per share, compared with the average annual deficit of 8¢-9¢ per share produced by the Fiber Division plus Ketchikan during the 1973-1976 span. Most important of all, FMC would finally have rid itself of a monumental headache, a long-standing drain on executives' time, and a serious negative from an investment appraisal standpoint. One only wonders what took the company so long.

The Tanker Problem

Of far less significance over time, but having some potential to penalize near-term operating results, is FMC's trouble-plagued tanker construction program. In 1972, the decision was made, apparently at a relatively low management level, to commit the the company to six separate leveraged-lease contracts to build six 35,000 deadweight ton intercoastal oil tankers for Standard Oil of California (SOCAL). Not only had FMC never built any such vessels

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*Other things being equal, purchase of FMC's rayon business by any one of the other three U.S. rayon producers probably would violate Section 7 of the Clayton Act. It is possible, however, to qualify such a transfer under the "failing company" doctrine. Under precedents established in two Supreme Court cases (U.S. vs. Citizens Publishing Co. and U.S. vs. General Dynamics), FMC must show (a) that the fiber business is "distressed" in the sense of not being viable on a continuing, long-range basis and (b) that it has been offered to, and rejected by, a representative list of potential purchasers outside the fiber industry as well as smaller companies within the industry. If and when FMC can establish these criteria, it may be able to secure clearance from the FTC to approach the #2 or #3 rayon companies under the "failing company" doctrine.

previously – though it has had extensive experience as a builder of barges – but the design incorporated new technological concepts. The company's inexperience apparently also extended to the matter of how to write the contracts and manage its customer requests for changes in specifications, of which there proved to be many. As if this were not inauspicious enough, the construction period commenced in 1973, just as the rate of inflation in materials and labor costs was beginning to accelerate.

Against this backdrop, not only were there substantial delays in the schedule but also hefty cost overruns. As of the end of 1974, the latter were estimated at $50 million, compared with the original contract price of $97 million for the six tankers. Against this $50 million, FMC in 1973 and 1974 established loss provisions of $25.2 million pretax (or 41¢ per share after tax). Although no further loss provision was taken in 1975, the estimated project cost overrun did, in fact, grow – to $58 million as of December 31, 1975, even though FMC in June of last year negotiated an increase of about $6 million in the aggregate *contract price* of the first three tankers. In other words, the new total contract price is now $103 million, while costs are expected to total $161 million.

FMC's contention is that this $58 million overrun is "primarily attributable to the design changes and related matters for which SOCAL is responsible." And, naturally, SOCAL has disputed this view. One facet of the "New Arrangements" of June 1975 (referred to above) was the establishment of procedures, including arbitration if necessary, for the resolution of FMC's claims for additional payments. In addition to this concession, FMC "won" the added $6 million for the first three ships, an extension of delivery dates for each of the first three ships, and the elimination of "take out" provisions on these three vessels (whereby FMC might have had to take title to the tankers in the event of missing a scheduled delivery date).

In exchange, the company *appears* to have given up something with respect to its rights for additional compensation for design changes already made. The footnote in FMC's Annual Report, while lengthy, is incomplete on this score and is no model of clarity overall: the "New Arrangements" also contain language setting a ceiling of *$29 million* apiece on each of the first three vessels, comapred with their present, renegotiated price of about $18 million.

While this has been a sorry – and costly – situation for FMC, it does seem that, with the first vessel having been completed and delivered last December, the company is now far enough along on the learning curve that additional cost overrruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility. It is the observer's opinion that FMC will wind up "in the bag" for a large percentage of the approximately $33 million balance of the cost overruns not already reserved against. The assumption that half, say, of this amount will be provided out of 1976 earning results in the 25¢ per share after-tax reduction used by the writer in arriving at his overall $3.75 per share 1976 estimate for FMC.

H. C. WAINWRIGHT & CO.
W. D. Williams

EXHIBIT B, ANNEXED TO COMPLAINT.

The Wall Street Transcript
May 10, 1976
Page 43,669

W.D. Williams of H.C. Wainwright & Co. says in a Special Report (April 13-7pp) on **FMC CORP.** (25) that 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment. And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year.

His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975.

According to Williams, one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division. He says the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings. And, concerning the tanker situation, he writes that the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility.

EXHIBIT C, ANNEXED TO COMPLAINT.

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May 27, 1976

Dear Mr. Holman:

The Wall Street Transcript recently published three unauthorized abstracts of research reports prepared and copyrighted by our client H. C. Wainwright & Co., namely, the Special Report dated April 13, 1976 concerning FMC Corp., the abstract of which appears on page 43,669 of the May 10, 1976 issue of The Wall Street Transcript, the Basic Report dated April 27, 1976 concerning Overnite Transportation, the abstract of which appears on page 43,689 of the May 17, 1976 issue of The Wall Street Transcript, and the Special Report dated April 28, 1976 concerning Monsanto Company, the abstract of which appears on page 43,789 of the May 24, 1976 issue of The Wall Street Transcript.

The abstracts consist in their entirety of verbatim extracts from, and paraphrases of, portions of the reports. It appears to us that the abstracts clearly infringe the copyrights of H. C. Wainwright & Co.

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We are writing with the hope that litigation will not be necessary, and that satisfactory arrangements can be made to assure H. C. Wainwright & Co. that similar incidents will not occur in the future. However, if we do not receive a satisfactory response from you or your attorneys in this regard by June 4, 1976, we will recommend that H. C. Wainwright & Co. pursue its legal remedies.

Very truly yours,

Stephen A. Greene

Wall Street Transcript Corporation
120 Wall Street
New York, New York 10005

Attention: Mr. Richard A. Holman,
Publisher

BY HAND

EXHIBIT D, ANNEXED TO COMPLAINT.

Page 3

Exhibit

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Registration of a Claim to Copyright in a published book manufactured in the United States of America

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EXHIBIT D, ANNEXED TO COMPLAINT

H.C. WAINWRIGHT & CO.
Established 1868

BASIC REPORT

April 27, 1976

OVERNITE TRANSPORTATION (OVT)

Earnings (Years ending Dec. 31)

Actual 1974	$2.78 per share
Actual 1975	2.03 per share
Estimated 1976	3.00 per share
Current annual dividend rate	0.80 per share

Current price	22
1976 Range to date	24-19
P-E based on 1976 estimate	7
Yield	3.6%

Commentary

Last year, Overnite Transportation experienced a sharp earnings reversal because the carrier was unable to reduce operating expenses sufficiently to compensate for the recession-related dropoff in revenues. While Overnite benefits from paying low wage rates to nonunion employees, the company has historically maintained a no-layoff policy for regular full-time employees so workers could depend on a 40-hour work week. However, attempts to maintain this policy throughout the downturn curtailed profits to the point where employee layoffs became absolutely necessary. A sharp decline in capacity utilization also contributed to the earnings decline.

Since the fall of 1975, however, cost-cutting measures combined with strengthening revenues reversed the earnings pattern, and it appears that this favorable trend will continue throughout 1976. Productivity gains are finally being realized, aided by the now fully operational breakbulk terminal located in the center of Overnite's route authority. Furthermore, with the recent additions of route authority and the planned development of new business between Ohio and the Southeast, the carrier should be positioned to extend the favorable earnings trend into 1977.

Before Overnite can be expected to significantly improve on uneven earnings performance since 1971, this analyst believes it necessary for management to take several steps: (1) expand operating authority to reduce dependence on the Southeast, (2) place greater emphasis on sales, and (3) refine and tighten the company's system of revenue and expense controls. While progress is apparently being made in all three areas, it is still too early to precisely define the effects of these actions on the long term outlook.

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1975 Results

Earnings dropped 27% to $2.03 per share for 1975, the lowest net income figure since 1970. With no significant extension of route authority to bolster volume, and with an important customer – the textile industry – hard hit by the recession, Overnite's ton miles dropped 14.4%; the decline in revenues –7% – was relatively moderate, thanks largely to freight rate increases and a slight improvement in the freight mix.

Despite a variety of cost control measures, management was able to trim operating expenses by only 3% for the full year, partly because employee layoffs had been deferred to the last possible moment, and partly because of an 11% increase in depreciation charges. In addition, competitive pressures and the desire to improve the company's standing in the industry dictated that fairly high service standards be maintained despite their cost. Finally, new operating expenses were added with the startup in mid-1975 of the large, 216-door break-bulk terminal in Gaffney, South Carolina. The new terminal consolidates 85% of all break-bulk freight (a job previously performed at eleven different locations), improves service by giving every shipper consistent two-day delivery between any point in the Overnite system, and has allowed trailer schedules to be tightened at all terminals, thereby boosting dockworker productivity. As an unfortunate byproduct, however, it has also increased the number of vehicle miles driven relative to ton miles. Thus, average trailer loads – defined as ton miles divided by vehicle miles – declined a substantial 7.2% from the 1974 level, to a seven-year low of 17,964 pounds, while the number of empty dispatches rose almost 50% to 26,192 from 17,610 in 1974. Theoretically, future volume gains will require smaller increases in the number of vehicle miles driven, and the advantages of the Gaffney terminal will become more apparent with every further increase in volume. In retrospect, the extended period of light tonnage probably aided the company in phasing in Gaffney so easily.

Table 1 presents interim operating results since 1973. As the table indicates, the operating ratio reached a high of 92.2% for the March 1975 quarter, then dropped to 83.1% for the December period – its lowest fourth-quarter level in three years.

(See Table 1 on following page)

Table 1

Interim Operating Results
(In millions)

Quarter Ending	Revenue	Operating Ratio	Operating Income	Other Expense	Pretax Income	Effective Tax Rate	Net Income	Earnings Per Share
1973 March	$ 21.7	82.1%	$ 3.9	$0.1	$ 3.8	50.5%	$1.9	$0.62
June	22.6	81.2	4.2	–	4.2	50.4	2.1	0.68
September	23.4	83.1	4.0	–	4.0	50.0	2.0	0.68
December	24.0	84.2	3.8	0.4	3.4	50.0	1.7	0.56
Year	$ 91.7	82.7	$15.9	$0.5	$15.4	50.4	$7.7	$2.54
1974 March	$ 26.0	82.4%	$ 4.6	$0.2	$ 4.4	49.8%	$2.2	$0.75
June	27.1	80.7	5.2	0.2	5.0	50.2	2.5	0.83
September	26.4	85.3	3.9	0.2	3.7	47.4	2.0	0.65
December	22.6	84.1	3.6	0.2	3.3	51.4	1.6	0.54
Year	$102.1	83.1	$17.3	$0.8	$16.5	49.7	$8.3	$2.78
1975 March	$ 20.9	92.2%	$ 1.6	$0.2	$ 1.4	39.6%	$0.8	$0.28
June	22.9	87.9	2.8	0.2	2.5	45.7	1.4	0.46
September	25.7	83.9	4.1	0.2	3.9	48.1	2.0	0.67
December	25.5	83.1	4.3	0.2	4.1	53.7	1.9	0.62
Year	$ 95.0	86.5	$12.8	$0.9	$11.9	48.5	$6.1	$2.03
% Increase (Decrease) 1975 vs.1974								
March	(20%)		(65%)					(63%)
June	(15)		(46)					(45)
September	(3)		5					3
December	13		19					15
Year	(7)		(26)					(27)

1976 Prospects

In the strong economic environment projected for 1976, Overnite may be able to achieve record earnings of $3.00 per share. The ton mile, revenue, and operating expense assumptions underlying this estimate are discussed below.

Ton Miles

Historically, industry tonnage trends have displayed a cyclical sensitivity to economic swings as measured by the FRB Index of Industrial Production. Overall physical output is expected to climb 8%-10% in 1976, but Overnite should be able to outperform the industry with a 12% advance in tonnage, and perhaps a 17% gain in ton miles. Several factors support this projection.

First, the Southeastern economy, which led the national downturn, appears to be leading the recovery as well, with both the textile and tobacco industries (two important customers for Overnite) showing substantial strength. Overnite, in particular, has seen an increase in the number of its customers, primarily because of recent emphasis on reestablishing old business relationships. Second, on February 2, 1976, Overnite began operating over new route authority purchased from Kent Freightlines. With Philadelphia, Southeastern Pennsylvania, and Southwestern New Jersey now open to penetration, this new authority could add as much as $2 million in revenues for 1976. Third, the new Gaffney terminal should enhance traffic flow by relieving bottlenecks at other terminals (at Atlanta and Charlotte, for example), thereby freeing personnel to actively solicit freight in local areas. The Gaffney facility is also expected to improve systemwide service levels. While Overnite is no longer providing following-morning service in under-150-mile markets, as in the past, the company has become more competitive in longer haul segments by providing consistent second-day service. In this way, management hopes to attract more long-haul and less-than-truckload (LTL) freight from tobacco and tire companies, as well as from larger manufacturers such as IBM. Accordingly, on the assumptions that tonnage rises 12% and average length of haul advances 4%-5%, overall ton miles could increase 17.0% in 1976.

Revenues

Revenues should benefit from the carryover of 1975 freight rate increases, as well as from a 5%-6% hike that went into effect on April 12, 1976 (filed by the Southern Rate Conference in response to the annualized 10% Teamster wage rate increase that became effective on April 1, 1976). Thus, full-year freight rates should show a 7% increase from 1975 levels. On the other hand, Overnite's freight mix will probably deteriorate modestly, reflecting the growing percentage of truckload shipments (which the company is aggressively soliciting) and commodity-rated business. Accordingly, as Table 2 indicates, the overall revenue gain may approximate 23%-24%.

(See Table 2 on following page)

Table 2

Projected 1976 Operating Revenue Year-to-Year Changes

	1974	1975	Estimated 1976
Tonnage	(5.6%)	(15.1%)	12.0%
Average length of haul	3.8	1.0	4.5
Ton miles	(1.7)	(14.3)	17.0
Freight rates	10.6	7.3	7.0
Freight mix	2.8	1.1	(1.5)
Total revenues	11.4	(7.0)	23.2

( ) Denotes decrease.

Operating Expenses

Operating expenses are expected to rise 20%-21% in 1976 largely as a result of a 7% advance in unit costs and a 12%-13% increase in capacity as measured in vehicle miles. As Table 3 indicates, Overnite's capacity utilization rate has been declining since 1973, reflecting: (1) an increase in vehicle miles relative to ton miles (vehicle miles have expanded more or contracted less than ton miles during the previous phases of the business cycle); and (2) an increase in trailer carrying capacity. For 1976, however, trailer capacity will probably remain unchanged, while vehicle miles could expand by about 12%. Since, as stated previously, ton miles are projected to rise 17%, 1976-1977 capacity utilization would then improve modestly, though still falling short of 1973 and 1974 levels. The major obstacle to improvement in this area is the Gaffney terminal. Under the previous system, freight was moved either directly to the destination terminal or through one of 11 consolidation points relatively close to the origination or destination terminal. With virtually all breakbulk freight now going through Gaffney, both inbound and outbound dispatched loads are heavier, but more miles are being traveled. Another aspect to the reduction in capacity utilization is that while scheduled daily departures of trailers have dropped to 950 per day from the 1,040 peak in 1975, schedules are expected to be added throughout 1976.

(See Table 3 on following page)

Table 3

Capacity Utilization
(In millions)

	Vehicle Miles (a)	x	Trailer Capacity (b)	=	Capacity Miles (c)	Ton Miles (d)	Ton Miles per Capacity Miles (f)
1976(e)	82.5		9,387		774.4	773.5	1.00
1975	73.4		9,387		689.0	659.3	0.96
1974	79.5		9,292		738.7	769.8	1.04
1973	76.1		7,874		599.2	783.2	1.31
% Increase (Decrease)							
1976-1975	12.4%		0.0%		12.4%	17.3%	
1975-1974	(7.7)		1.0		(6.7)	(14.4)	
1974-1973	4.5		18.0		23.3	(1.7)	

(a) Includes road and peddle miles, excluding city pickup and delivery miles.
(b) Cubic footage of highway trailers.
(c) Product of (a) and (b).
(d) As reported to the ICC.
(e) Estimated.
(f) Ton miles divided by capacity miles.

Despite the limited prospects for capacity utilization improvement in 1976, labor productivity, as measured by ton miles per employee, may approach the 1973 peak. As indicated earlier, the Gaffney terminal will contribute to this gain by tightening trailer arrivals at terminals throughout the system, thereby boosting dockworker efficiency. The improving productivity trend is shown in Table 4.

Table 4

Productivity

	Ton Miles (mils.)	Average Employment	Ton Miles per Employee
1976(e)	773.5	4,420	175.0
1975	659.4	3,887	169.6
1974	769.8	4,488	171.5
1973	783.2	4,423	177.1
1972	635.1	4,126	153.9
1971	530.2	3,755	141.2

(e) Estimated.

Total labor costs will probably climb about 25% for 1976, on the basis of a 13%-14% rise in average employment as well as the annualized 10% gain in wage rates. Overnite's wage rates are at 77% of the Teamster wage scale, and management is unlikely to allow this spread to widen materially because of the risk of employee dissatisfaction (see Table 5). While the Teamster wage adjustment took place on April 1, 1976, Overnite's drivers usually do not receive increases until the fall months; the wages of terminal personnel are customarily raised on a staggered basis.

(See Table 5 on following page)

Table 5

Wage Rate Differential (a)

	Teamsters	Overnite	% Overnite to Teamsters
1976(e)	$7.575	$5.863	77.4%
1975	6.845	5.330	77.9
1974	6.515	4.920	75.5
1973	6.135	4.250	69.3
1972	5.515	3.820	69.3

(a) Average hourly wage rates per year for hourly workers as a proxy for wages for all employees.

(e) Estimated.

Fuel is likely to register the largest increase among the remaining cost categories. The price per gallon appears to have stabilized at 45¢; if maintained, this level would represent a 6%-7% rise in the average per gallon price from 42.2¢ for 1975. Total fuel costs may rise by as much as 20%, however, reflecting a 12% rise in consumption stemming from an increase in vehicle miles driven. Depreciation charges will probably rise 9.1% to $8.0 million. "Other expenses" in aggregate are expected to increase a modest 9%-10%, with most of the upward pressure coming from insurance and claims costs. (Even though this area showed considerable improvement in 1975 – perhaps because of the strong tie-in with the incentive program – this year's rate of increase could approach the projected gain in operating revenues.) Table 6 summarizes estimated operating expense trends for 1976.

Table 6
Projected 1976 Operating Expenses (a)

	Actual			Estimated	
	1974	1975	% Incr. (Decr.)	1976	% Incr. (Decr.)
Labor					
Average headcount	4,488	3,887	(13.4%)	4,420	13.7%
Average wage per employee	$12,166	$13,512	11.1	$14,863	10.0
Total wages & fringes (mils.)	$ 54.60	$ 52.52	(3.8)	$ 65.70	25.1
Fuel					
Consumption (mil. gal.)	18.85	16.31	(13.5%)	18.27	12.0%
Cost per gallon	37.9¢	42.2¢	11.3	45.0¢	6.6
Fuel costs (mils.)	$ 7.15	$ 6.89	(3.6)	$ 8.22	19.3
Depreciation (mils.)	$ 6.60	$ 7.33	11.1	$ 8.00	9.1
Other expenses (mils.)					
Operating supplies	$ 8.20	$ 7.60	(7.3%)	$ 8.09	6.0%
Op. tax and licenses	4.24	4.14	(2.4)	4.64	12.0
Insurance & claims	2.00	1.68	(16.0)	2.02	20.0
Rents & purchased transp.	0.39	0.24	(38.5)	0.24	0.0
Communication & Utilities	1.59	1.80	[illegible]	1.89	5.0
Total	$ 16.42	$ 15.46	([illegible])	$ 16.88	9.2
Total operating expense (mils.)	$ 84.77	$ 82.20	(3.0%)	$ 98.80	20.2%

(a) ICC basis.

Table 7 presents estimated 1976 results for Overnite based on previously indicated volume and capacity projections. As the table indicates, net income should rise somewhat more rapidly than operating income, reflecting slight reductions in non-operating expenses (primarily interest) and in the effective tax rate.

Table 7

Possible 1976 Results
(In millions)

	Actual			Estimated	
	1974	1975	% Incr. (Decr.)	1976	% Incr. (Decr.)
Operating revenue	$102.1	$ 95.0	(7.0%)	$117.0	23.2%
Operating expense	84.8	82.2	(3.1)	98.8	20.2
Operating income	$ 17.3	$ 12.8	(26.0)	$ 18.2	42.2
Operating ratio	83.1%	86.5%		84.4%	
Non-operating expense	$ 0.8	$ 0.9		$ 0.8	
Pretax income	16.5	11.9		17.4	
Income tax	8.2	5.8		8.4	
Effective tax rate	49.7%	48.5%		48.5%	
Net income	$ 8.3	$ 6.1	(26.5)	$ 9.0	
Common shares	3.0	3.0		3.0	
Earnings per share	$ 2.78	$ 2.03	(27.0)	$ 3.00	47.8
Ton miles (mils.)	769.8	659.4	(14.3%)	773.5	17.0%
Vehicle miles (mils.)	79.5	73.4	(7.7)	82.5	12.4
Average load (lbs.)	19,368	17,964	(7.2)	18,763	4.4
Revenue per ton mile	13.26¢	14.41¢	8.7	15.13¢	5.0
Operating expense per vehicle mile	106.7¢	112.0¢	5.0	119.8¢	7.0

Long-Term Outlook

1977 Prospects

According to the H. C. Wainwright forecast, the pace of economic recovery will begin to slow in the second half of 1976, growth in real output (as measured by the FRB Index of Industrial Production) is expected to moderate in 1977, while inflation may accelerate. With no significant productivity gains in prospect, overall U.S. corporate profits may not show significant progress from 1976. On the other hand, however, Overnite has a number of unusual factors working in its favor that could offset the effects of the adverse economic conditions and extend the current earnings momentum into 1977.

Revenue. Although industrial production is expected to rise no more than modestly in 1977, Overnite could enjoy an increase in ton miles of as much as 12%. This expectation rests on projected increases of 8% in tonnage and 4% in average length of haul, stemming from Overnite's anticipated purchase of route authority between Louisville, Kentucky and Cincinnati, Ohio. The new authority will link the company's predominantly Southeastern route system with its irregular route authority, encompassing the entire State of Ohio. The company's

next step will then be to convert the Ohio authority from irregular to regular route authority affording Overnite greater flexibility with regard to entry and exit routes in Ohio.

At present, Overnite hauls only two or three trailer loads per day to and from Ohio because of: (1) route restrictions in reaching Cincinnati; (2) the limitations imposed by the single Cincinnati gateway; and (3) a lack of Overnite terminal facilities within the state. Presumably, the ICC-approved addition of new route authority and subsequent modifications of route restrictions will eliminate the first two obstacles. With respect to the third, management plans to build or lease three or four new terminals – certainly one each in Columbus and Dayton, and possibly in Toledo and the Cleveland/Akron areas as well. With these changes, Overnite would be well placed to take advantage of the substantial amounts of heavy industry in Ohio by linking this area with the Southeastern states.

With the recent addition of the Gaffney terminal and substantial purchases of highway equipment. Overnite has more than ample physical facilities to maximize the benefits of the Ohio authority On the other hand, the company will certainly have to intensify its sales effort in order to establish shipper relationships in this new territory. Management recognizes this problem, however, and is already planning to deal with it as the situation unfolds.

While the development of the Ohio authority is expected to account for most of the differential between the modest increase in industrial output and Overnite's projected 12% growth in ton miles, several other factors will also contribute to the company's revenue growth. For one thing, the soon to be acquired Lousville-Cincinnati bridge authority will include 20 counties in Kentucky; if Overnite can acquire additional authority in Tennessee, it will have an opportunity to provide service on the lucrative link between Nashville, Tennessee and Louisville and Lexington, Kentucky. While management has not yet initiated negotiations for this additional authority, there is a clear possibility that such a purchase will be made well before the end of 1977. In addition, Overnite has applied for new route authority between Jacksonville, Florida and Houston, Texas. The case is still in the hearing stage at the ICC and no decision is expected before mid-1977. Although the filing has provoked some controversy, management believes there is a reasonably good chance for a favorable decision. Finally, the startup of the Gaffney facility has freed the company's other terminals to solicit freight more aggressively, without regard for breakbulk limitations. Moreover, as mentioned previously, average daily departure schedules will probably be increased in order to recapture former customers as well as to help develop the Ohio authority.

On balance, total revenues should advance 17%-18% for 1977, on the basis of the following assumptions: (1) that ton miles do indeed expand by 12%; (2) that freight rates will increase 7% (annualized) for the full year; and (3) that the deterioration in freight mix will penalize revenues by approximately 2%. The mix deterioration will probably stem from a higher proportion of longer haul business, which traditionally generates less revenue per ton mile, while the estimated 7% price increase would represent the required offset to higher wage rates.

Earnings Per Share. Overnite's 1977 operating ratio is expected to remain at essentially the 1976 level, on the assumptions that freight rate increases fully offset wage rate hikes, and that productivity gains relieve some of the inflationary cost pressures in both linehaul and terminal operations. As discussed earlier, the Gaffney facility should have an increasingly favorable impact on productivity, especially within terminals, as overall volume expands.

Operating efficiency should also be enhanced by management's possible appointment of regional managers. Under the present system, terminal managers tend to solve day-to-day problems themselves, since the vice president of operations (who is directly responsible for all 41 terminals) is limited in the amount of daily contact he can maintain with each facility (in fact, some of the operations responsibility is currently being shouldered by the senior vice president located in Charlotte, North Carolina). A tightly knit team of two or three regional managers would significantly improve operating efficiency and enable the various terminals to adopt a consistent approach to common problems. Such a step appears increasingly likely, especially with the growing importance of the Ohio territory and the need for more terminals.

Operating margins should also benefit from the relatively moderate pattern of prospective fuel cost increases, which are expected to average no more than 3¢-5¢ above the current 45¢ per gallon rate. Fuel costs currently represent 8% of total operating expenses.

Under the foregoing assumptions, operating and net income may advance to the upper end of a $3.25-$3.50 earnings per share range.

Beyond 1977

Following an historically high rate of per share earnings growth through 1971, Overnite has turned in an erratic profit performance over the past few years. The primary problems seem to have been (1) policy constraints in adjusting the labor force to cyclical swings in volume; and (2) the difficulty in identifying and attracting potentially profitable freight into the Overnite system. While the company has recently realized some progress in both areas, it still has not reached the point where uninterrupted annual profit growth can confidently be expected. Nevertheless, long-term earnings growth could average 12%-15% per year. One positive byproduct of the recent recession is that it has sensitized management to the importance of adjusting employment to changing volume levels. Until last year, Overnite's terminal managers had never laid off a full-time employee in good standing. With the 1975 experience fresh in mind, however, reaction time in future cyclical downturns is likely to be significantly accelerated.

Even so, it is important to understand the built-in rigidity of the Overnite system. The company's control procedures rest essentially on a fixed trailer departure and arrival schedule, maintained on a daily basis. It is these schedules that determine equipment and terminal manpower utilization, and to a lesser extent the amount or density of freight moving between terminals. Overnite has a system that informs terminal managers in advance as to how much freight is coming in; greater use of this system would presumably help in maximizing dock manpower efficiency and equipment utilization. However, the company's non-union status probably limits the extent to which it can effect manpower adjustments on a daily or weekly basis. Nevertheless, while Overnite's labor adjustments will probably never be as dramatic as in a unionized company, layoffs are now being treated as possible measures of last resort, where two years ago they were essentially unthinkable.

The non-union status itself bears further comment. Since Overnite's wage rates are substantially below the Teamster scale, and with the adoption of a more liberal layoff policy, it would seem that the company would be vulnerable to Teamster unionizing. A careful examination of Overnite's policies leads to the opposite conclusion, however.

In general, Overnite's employees have supported management's contention that unionization would disrupt the current management labor relationship and is otherwise undesirable. For one thing, the current working atmosphere is congenial; unproductive or undesirable workers are simply not hired. In addition, all employees can participate in a stock option program, a non-contributory retirement plan, and a liberal disability program. Furthermore, Overnite is already a comparatively well paying employer vis-a-vis the non-trucking companies in the areas in which it operates. Finally, and perhaps most significantly, if an employee is dissatisfied with Overnite's pay scale, he generally has the mobility to get a job with a union carrier, which is far less difficult than attempting to organize Overnite.

Beyond these factors, however, management enjoys a great deal of flexibility in dealing with direct union pressure. For a union – in this case, the Teamsters – to represent Overnite, it must first win a certification election at the terminal level. Since each terminal is considered a separate entity, a majority vote is required in each case. The union representatives must then begin contract negotiations with management. During the bargaining period – which lasts 12 months – wage rates at the particular terminal are frozen by law to prevent management from influencing the outcome. *Meanwhile, and this is a key point, management can grant raises at other terminals – which increases the pressure on the union representatives to win a lucrative contract.* If discussions become deadlocked, the union's final recourse is to persuade the workers to strike the terminal. At this point, the employees have not paid union dues, since they are not members until a contract is signed. Accordingly, strikes represent a potentially severe hardship – and deterrent – since there would probably be little or no strike compensation. If no contract emerges by the end of the 12-month bargaining period, the employees may hold a decertification election. Since 1963, there have been about 15 such cases, all of which resulted in decertification. While three terminal locations (Knoxville and Bristol, Tennessee and Baltimore, Maryland) have not formally decertified, management has indicated that it will not recognize the Teamsters as bargaining agents because the official bargaining year has expired. Thus, with little employee incentive to organize, a readily available labor pool, and substantial management flexibility, Overnite's non-union status is not as vulnerable as comparative compensation levels alone would seem to indicate.

The combination of prospective route authority expansion and increased terminal capacity from the Gaffney facility should enable the company to attract significant amounts of new business in the years ahead. A major question arises, however: whether management can build the necessary organizational structure to fully realize the profit potential of the incremental revenue.

Overnite's terminals are currently located within a 50-60 mile radius of every point that can be served within the existing route authority. Since no towns in the present system are large enough to justify the construction of a new terminal, expansion of the revenue base must necessarily come from acquisitions of new route authority. Once the Ohio route authority is improved, the next logical step will be to link such cities as Jacksonville, Birmingham, Nashville, Louisville, and Cincinnati. No additional expansion into the southern tier is currently contemplated, other than the public convenience and necessity (PC&N) application for authority to serve Jacksonville and Houston.

To maximize profitability of incremental revenues, management hopes to stress the following:

(1) A program to improve coordination between central linehaul dispatch and terminal managers in positioning headloads so as to minimize handling time. This program will be tied in with a computerized equipment control and dispatching system which will become operational later this year.

(2) A plan to improve coordination between sales and central linehaul dispatch so as to minimize balance problems and raise average trailer loads.

(3) The designation of terminals as distinct profit centers, thereby emphasizing revenue and expense relationships at the terminal level.

(4) Extending the average length of haul, toward the end of bolstering average trailer loads.

To the extent that the revenue base expands faster than the development of the above areas, Overnite's profit potential will be inhibited. If, however, significant progress is made in these areas over the next three years, then revenue and expense controls will probably be adequate to support profit growth over the foreseeable future. It must be stressed, however, that Overnite has relied on a less sophisticated system of controls than such carriers as Roadway, Yellow, or McLean; until controls are developed to a more meaningful extent, this analyst has less confidence that the company can achieve 15%-plus earnings growth over the longer term.

Historical Operating Results

Table 8 presents the 1965-1975 history of Overnite's return on total capital and equity, as well as the key components of these measurements. Also included is the company's internal sustainable growth rate, as derived from net return on equity and the payout ratio.

(See Table 8 on following page)

Table 8

Return on Capital and Equity

	(A) Operating Margin (a)	(B) Capital Turnover (b)	(C) Eff. Tax Rate	(D) Net Return on Total Capital	(E) Debt to Total Capital	(F) Net Return on Equity	(G) 1 minus Dividend Payout	(H) Internal Sustainable Growth Rate (c)
1975	13.2%	1.58	48.5%	11.0%	15.8%	12.2%	60.6%	7.4%
1974	16.8	1.94	49.7	16.6	16.5	18.9	71.9	13.6
1973	17.3	2.12	50.4	18.3	13.4	20.5	72.8	14.9
1972	21.2	2.27	50.7	24.2	11.9	26.9	77.4	20.8
1971	22.6	2.41	51.3	27.1	16.9	31.9	78.7	25.1
1970	15.9	2.20	52.6	16.8	27.3	21.5	73.1	15.7
1969	10.5	2.10	50.6	11.1	31.1	14.2	55.0	7.8
1968	13.1	2.11	51.5	13.3	30.7	17.8	61.3	10.9
1967	15.1	1.93	49.6	15.2	38.0	22.4	70.0	15.6
1966	10.9	1.97	41.6	12.8	43.5	20.0	60.8	12.2
1965	13.2	2.14	43.0	16.6	39.8	25.9	67.8	17.6

(a) Operating income dividend by total revenues.

(b) Revenues divided by total long-term invested capital.

(c) Internal sustainable growth rate equals return on equity times one minus the payout ratio.

Return on Capital

Although return on capital has fluctuated within a wide range since 1965, the overall trend has been decidedly downward since the 10-year high of 27.1% in 1971 (see Column D of Table 8). In fact, by 1975, the rate had fallen to 11.0%, somewhat below the 1965-1970 average of 14.3%. The major problem has been the weakening pattern in both operating margins and capital turnover; the 1975 operating margin (at 13.5%) was under the 1965-1975 average (15.4%), while capital turnover (at 1.58) was significantly below its ten-year average of 2.07. In turn, this relapse to pre-1971 profitability levels stems primarily from (1) the drop in tons carried per vehicle mile, especially in the less-than-truckload category, and (2) a decline in revenue per ton mile, followed by weakness in overall ton miles. Return on total capital should improve in the period ahead, principally on the strength of higher operating margins - partly a function of improved productivity – as well as increased volume. The capital turnover ratio may also recover somewhat, though new equipment and terminal purchases will probably limit the advance.

Return on Equity

As shown in Column (E) of Table 8, Overnite's debt-to-total-capital ratio has been reduced to 15.8% for 1975 from 39.8% for 1965, and this has contributed to the decline in return on equity. The company's philosophy is to reduce debt whenever the opportunity arises. Specifically, whenever the company accumulates cash that cannot be readily invested in the business, management's actions effectively lower return on equity below what would result under a different strategy. Since Overnite is currently accumulating cash, after additional

debt is paid off, excess liquid assets will probably place the company in an overcapitalized position and hence further penalize the rate of return on equity.

Internal Sustainable Growth Rate

Column (H) of Table 8 presents Overnite's theoretical earnings growth rate for each year covered in the table – i.e., the rate at which earnings would grow if return on equity and the payout ratio were to remain unchanged in subsequent years. For the past 10 years, the internal sustainable growth rate has averaged 14.7%, while actual compound earnings growth has been just 10.4%. On the assumption that there will be no material change in the payout rate, it appears that the actual earnings performance may more closely approximate the internal sustainable growth rate in the years ahead.

Operating Record

It should be pointed out that the 10.4% compound annual earnings growth rate of the past ten years is somewhat misleading, in that there has been considerable year-to-year variation in the percentages changes. As indicated in Table 9, most of the earnings growth occurred in 1970 and 1971, when profits jumped 76% and 90%, respectively.

Table 9

Operating Record
(In millions)

Years Ended Dec. 31	Operating Revenue	Operating Ratio	Operating Income	Net Other Expense	Eff. Tax Rate	Net Income	Share Earnings	Share Price Range	P-E Ratio Range	Avg. P-E To S&P 425
1975	$ 95.0	86.8%	$12.6	$0.9	48.5%	$6.1	$2.03	24- 9	12- 4	0.73
1974	102.1	83.2	17.2	0.8	49.7	8.3	2.78	20- 9	7- 3	0.53
1973	91.7	82.7	15.9	0.5	50.4	7.7	2.54	39-13	15- 5	0.75
1972	79.2	78.8	16.8	0.3	50.7	8.3	2.74	43-31	16-11	0.75
1971	67.7	77.4	15.3	0.3	51.3	7.4	2.47	38-13	15- 5	0.56
1970	54.3	84.1	8.6	0.6	52.6	3.9	1.30	14- 6	11- 5	0.48
1969	47.2	89.5	5.0	0.5	50.6	2.2	0.74	11- 6	15- 8	0.66
1968	42.4	86.9	5.6	0.4	51.4	2.5	0.84	13- 8	15-10	0.72
1967	37.5	84.9	5.7	0.4	49.6	2.7	0.91	10- 4	11- 4	0.44
1966	35.6	89.1	3.9	0.4	41.6	2.0	0.68	9- 4	13- 6	0.63
1965	30.8	86.8	4.1	0.3	43.0	2.2	0.75	10- 8	13-11	0.71
Compound annual growth										
1975-1970	11.8%		7.9%				9.3%			
1970-1965	12.0		16.0				11.6			
1975-1965	11.9		11.9				10.4			

Operating Statistics

Since the early 1960's, it has been management's policy to match the growth of interstate operating authority with the development of additional intrastate routes in order to maximize the company's penetration of the Southeast and expand its service capabilities. Through purchases of relatively small franchises, the carrier has been able to attract significant amounts of additional freight, and, except for 1975, ton mile growth has outperformed the

FRB Index of Industrial Production. Moreover, because of this concentration of route authority, Overnite has been able to accommodate the increased freight by expanding individual terminal capacity rather than adding new facilities. Accordingly, volume per terminal grew rapidly through 1973, though it has since stabilized. Table 10 presents these trends.

Table 10

Ton Miles

Years Ending Dec. 31	FRB Industrial Production Index	Terminals	Ton Miles(a)	Ton Miles per Number of Terminals
1976(e)	126.3	41	773.5	18.9
1975	115.9	41	659.4	16.1
1974	123.4	41	769.8	18.8
1973	126.8	41	783.2	19.1
1972	118.3	38	635.1	16.7
1971	107.0	37	530.2	14.3
1970	105.5	35	489.7	14.0
1969	111.1	34	495.9	14.6
1968	106.7	35	313.7	9.0
1967	100.8	37	271.2	7.3
1966	99.4	39	263.7	6.8
1965	90.9	39	227.1	5.8
% Increase (Decrease)				
1976-1975(e)	9.0%		17.0%	
1975-1974	(6.1)		(14.3)	
1974-1973	(2.7)		(1.7)	
1973-1972	7.2		23.3	
1972-1971	10.6		19.8	
1971-1970	1.4		8.3	
1970-1969	(5.0)		(1.3)	
1969-1968	4.1		58.1	
1968-1967	5.9		15.7	
1967-1966	1.4		2.8	
1966-1965	9.4		16.1	

(a) In millions.
(e) Estimated.

During the 1965-1975 period, Overnite's operating ratio has also fluctuated rather widely – between a 1969 high of 89.4% and a 1971 low of 77.1%. Consequently, the company has experienced wide earnings swings, an unusual pattern for a motor carrier with above-average levels of profitability. This overall pattern probably reflects the no-layoff policy, which, as discussed previously, was designed to compensate employees to some degree for their non-union status and somewhat lower wage rates, but has also prevented management from reacting to adverse economic conditions and implementing comparatively effective expense controls as quickly as some of the unionized carriers.

EXHIBIT D, ANNEXED TO COMPLAINT

As Table 11 indicates, Overnite's operating characteristics changed materially in 1969, when the average length of haul rose almost 50%, raising the average trailer load by about the same percentage. Unfortunately, although these gains should have substantially enhanced productivity, they were more than offset by the erosion of revenue per ton mile (yield). During 1970 and 1971, an improvement in yield, together with modest unit cost increases, reduced the operating ratio to 77.4%. When the yield dropped substantially in 1973, the average trailer load (tonnage hauled per vehicle mile traveled) went into an extended downturn, which effectively lowered linehaul efficiency and forced the operating ratio into a renewed climb – to 86.5% by year-end 1975. Most of the deterioration occurred in the LTL category (as noted in the second column of Table 11). Average trailer loads should recover throughout 1976 and 1977, however, on the strength of (1) an increase in average length of haul, reflecting the Gaffney breakbulk terminal and the development of the Ohio territory; and (2) an advance in tonnage per vehicle mile as a result of the overall strengthening in system tonnage. Nevertheless, competitive conditions will probably preclude a return to the average trailer loads of the mid-1960's for the foreseeable future.

(See Table 11 on following page)

Table 11

Operating Statistics

	Ton Mile/ Ton (Average Length of haul)	x	LTD Veh. Mile	TL Veh. Mile	Total Tons Veh. Mile	=	Ton Mile/ Veh. Mile (Average Trailer Load)	x	Revenue Ton Mile (Yield)	=	Revenue Veh. Mile	Op. Expense Veh. Mile	=	Operating Ratio
1975	301		13.2	16.6	29.8		17,964		14.41¢		129.4¢	111.9¢		86.8%
1974	298		14.0	18.5	32.5		19,368		13.26		128.4	106.7		83.2
1973	287		14.9	21.0	35.8		20,570		11.71		120.5	99.6		82.7
1972	270		17.2	18.7	35.9		19,404		12.47		121.0	95.3		78.8
1971	251		19.5	18.7	38.2		19,179		12.77		122.5	94.8		77.4
1970	257		19.8	17.8	37.6		19,329		11.09		107.2	90.2		84.1
1969	272		20.5	18.4	38.9		21,140		9.52		100.6	90.0		89.5
1968	185		21.0	17.1	38.1		14,085		13.53		95.3	82.8		86.9
1967	174		23.9	17.7	41.6		14,465		13.82		100.0	84.9		84.9
1966	171		21.7	15.7	37.1		12,685		13.50		85.6	76.3		89.1
1965	169		21.2	14.6	35.8		12,103		13.57		82.1	71.3		86.8
Index: 1965=100														
1975	178		62	114	83		148		106		158	157		100
1974	176		66	127	91		160		98		156	150		96
1973	170		70	144	100		170		86		147	140		95
1972	160		81	128	100		160		92		147	134		91
1971	149		92	128	107		158		94		149	133		89
1970	152		93	122	105		160		82		131	127		97
1969	161		97	126	109		175		70		123	126		103
1968	109		99	117	106		116		100		116	116		100
1967	103		113	121	116		120		102		122	119		98
1966	101		102	108	104		105		99		104	107		103
1965	100		100	100	100		100		100		100	100		100

EXHIBIT D, ANNEXED TO COMPLAINT

-19- **OVERNITE TRANSPORTATION**

Management and Organization

Overnite was founded in 1935 by the present Chairman of the Board, Harwood Cochrane, age 64, who concentrates his attention on acquisitions of new route authority, the establishment of new shipper relationships, and general troubleshooting. President Kenneth G. Gentil (50), who came to Overnite from the Fruehauf Company in 1970, is primarily involved in fleet planning and purchases, as well as sales. A. W. Duke, Jr. (44), Vice President of Operations, has held his current position for less than two years, having previously served as Vice President of Insurance and Safety. Mr. Duke is the top operations administrator and, as such, allows his terminal managers a good deal of independence. Much of the operations expertise comes from Andrew M. Price (56), Senior Vice President and long-time employee of Overnite, who advises Mr. Cochrane, as well as individual terminal managers, on a broad range of operations matters.

Although management views itself as operations – rather than sales-oriented, in that it stresses transit times, efficient terminal operations, and route authority access in order to attract and hold incremental freight business, it is somewhat surprising that the carrier has not developed a profit and loss statement for each terminal facility. Such a capability would presumably greatly aid in the early detection of revenue and cost problems.

Overnite's incentive compensation program has been in effect for six years, and in its present form for over three years. The program includes terminal managers, assistant terminal managers, and all sales representatives, providing maximum bonuses of 30%, 20%, and 15% of their respective salaries. While a full payout cannot be made unless the company's overall revenue objective has been met in a particular year, as much as 50% is available to individuals in terminals that have reached their targets, even if the company as a whole has not done so. The major deficiency in the program seems to be that terminal managers do not know what value is attached to the various performance measures in determining payouts. In general, management has indicated to this analyst that pounds per manhour has the heaviest weighting and that such factors as claims, delinquent amounts, sales quota, trailer load average, and safety all have the same relative importance.

Company Development – Acquisitions

When Overnite began operations in 1935, the entire system comprised one terminal in North Carolina and one in Virginia. Subsequent acquisitions expanded the company's operating authority throughout the Southeast, and the present territory is bordered by Jacksonville, Florida; York, Pennsylvania; and Nashville, Tennessee, as may be seen in the map on the following page.

(See map on following page)

EXHIBIT D, ANNEXED TO COMPLAINT

April 27, 1976 -20-

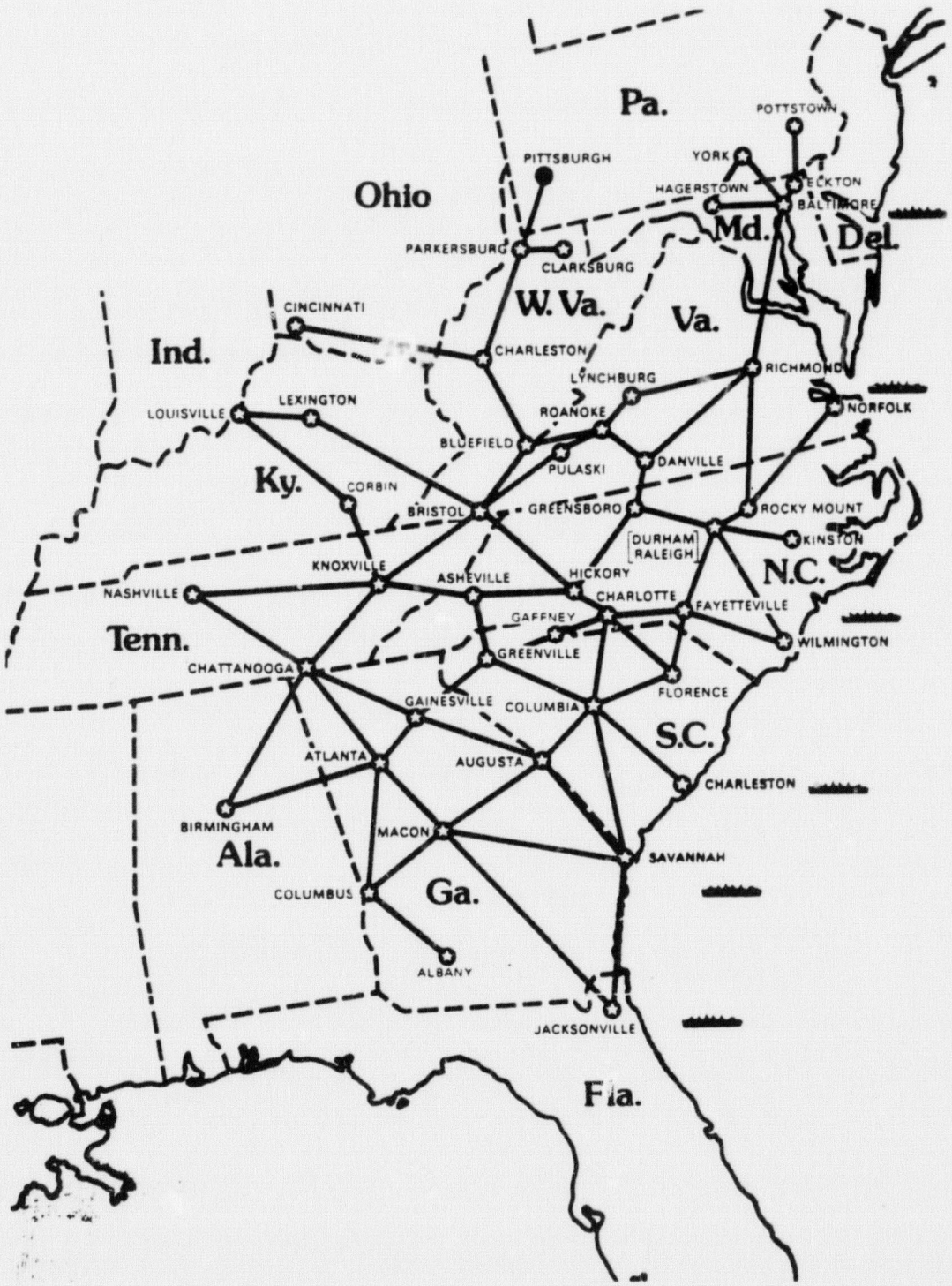

EXHIBIT D, ANNEXED TO COMPLAINT

-21- **OVERNITE TRANSPORTATION**

Acquisitions have contributed significantly to Overnite's territorial growth. The carrier has wisely avoided single large-scale purchases, which so often present unanticipated, and frequently overwhelming, problems. Table 12 lists the company's acquisitions since 1965.

Table 12

Recently Acquired Operating Authority

	Company	Location	Cost
1965	–	Virginia operating rights	$100,500
	–	intrastate southern Georgia	32,000
1966	Tamiami Freightways	Georgia	$ 35,000
	Richmond-Petersburg Freight Line	Virginia	48,000
	Garst Truck Line	Virginia	14,000
	Miller Motor Express	North Carolina	29,000
1968	Alabama Highway Express	Birmingham	600,000
1970	General Motor Lines	W. Virginia, Charleston	33,000
	George Meade Transfer	Kentucky	67,000
1972	Tidewater Express, Inc.	Md., Pa., Del., Wash. D.C.,	284,000
	Myers Transfer	W. Virginia, Ohio, Kentucky	57,000
	–	Savannah, Ga.-Jacksonville, Florida	87,000
1973	Mills Transfer	Pittsburgh, Pa.	100,000
	Bardstown Transfer	Bardstown, Kentucky	59,000
	Spade Continental	intrastate Ohio	665,000
1974	Aaron Smith	Kentucky	21,000
	Consolidated Freightways	Maryland	29,000
	Harris Motor Express	North Carolina, W. Virginia	57,000
1975	Switch from irregular to regular route authority	Tennessee-Kentucky	91,000
1976	Kent Freight Lines	Pennsylvania	297,000

As Table 12 indicates, Overnite's largest acquisition since 1965 was Spade Continental, which added irregular route authority into Ohio. At this point, it is important to distinguish between "regular" and "irregular" route authority. A regular franchise specifies the points that may be served and the roads that must be used, and obligates the carrier to maintain a minimum regularity of service; most of Overnite's franchises fall into this category. Under irregular route authority, a carrier is permitted to serve a defined geographic region with no frequency stipulation, but freight can be freely interchanged only at those points where regular and irregular authorities overlap. The Spade Continental purchase connects Ohio to the Overnite system only at Cincinnati. Since there is a gap in Overnite's franchise between Cincinnati and Lexington, the company has a leasing agreement with another carrier for interchange purposes. The Ohio linkage provides limited benefits under the present setup, but, as indicated earlier, management is contemplating a further acquisition later this year to bridge the Cincinnati/Lexington gap.

Not surprisingly, textile products constitute the major commodity in Overnite's freight mix. Table 13 indicates the largest categories of freight, together with their respective changes in share between April 1975 and January 1976. As the table indicates, textile shipments revived somewhat during the period..

Table 13

Distribution of Revenue by Industry Grouping

	Apr. 1975	Jan. 1976
Textile products	22.8%	24.0%
Food products	8.4	8.6
Paper products	7.0	8.1
Tobacco products	4.5	4.3
Soaps and/or cleaning compounds	2.9	4.0
Tires and related articles	2.8	2.4
Military traffic	0.9	1.0
Alcoholic beverages	0.5	0.5
All other general commodities	50.2	47.1
Total	100.0%	100.0%

Highway Equipment

Overnite's 1976 highway fleet is expected to remain at 1975 levels, as indicated in Table 14.

Table 14

Fleet
(As of December 31)

	1972	1973	1974	1975	Estimated 1976
Tractors	1,078	1,258	1,401	1,439	1,439
Trailers	2,567	2,895	3,357	3,368	3,368
Straight trucks	453	474	476	453	453
Autos and service trucks	119	136	140	141	141
Total	4,217	4,763	5,374	5,401	5,401

The Overnite tractor fleet – which consists entirely of company-owned Mack tractors – includes approximately 700 three-axle units (52% of the total), of which 84 are configured for sleeper operations. Customarily, tractors are depreciated over three years, with a $5,000 residual for sleepers, and are traded in before the 500,000-mile mark is reached. The non-sleeper units are turned in on a 6-year schedule with a $2,500 residual. The company is cur-

rently attempting to extend the trade-in time to as much as 600,000 miles without performing out-of-frame overhauls (motivated by the increase in new road tractor prices partly as a result of the new brake standards enacted in March 1975). The company has been gradually replacing 40-foot trailers with 45-foot lengths, and the transition is about 70% complete.

As Table 15 indicates, the average age of Overnite's tandem-axle fleet increased to 31 months from 21 between July 1974 and December 1975, reflecting a sharp buildup of new tandem-axle tractors in 1973 and 1974. During the same period, the average age for single-axle tractors declined to 39 months from 52, reflecting the economic downturn as well as the trade-in of older units.

Table 15

Average Age of Fleet
(In months)

	July 1974	Dec. 1975
Tractors:		
3-axle	21	31
2-axle	52	39
Trailers:		
Linehaul	70	77
Pickup & delivery	93	83
Straight trucks	38	43

Terminals

Exclusive of several very small satellite locations, the Overnite system comprises 41 terminals, averaging 53 doors per terminal for a total of 2,164 doors. Two new terminals were recently opened (at Gaffney, South Carolina, and Albany, Georgia), and two older terminals were closed (in Clarksburg, West Virginia and Shelby, North Carolina).

The 216-door Gaffney breakbulk terminal has been fully operational for five months and is currently meeting or exceeding all of the objectives established two years ago, when the unit was in the final planning stages. About 38% of Overnite's tonnage requires breakbulk handling; the Gaffney terminal consolidates approximately 85% of this total, while the remainder goes through seven other locations.

Financial Position

Table 16 presents a summary of Overnite's sources and uses of funds for the 1971-1975 period, together with a projection for 1976. Capital expenditures peaked in 1974 and are expected to drop to a 5-year low this year, thereby freeing substantial amounts of internal funds. By year-end 1976, the company will have liquidated over $5 million in debt, increasing its net working capital to as much as $4 million. This estimate does not include the expected acquisition of bridge authority to Ohio; although this purchase could add $1.5

million to outlays, net working capital would still rise by a substantial $2.5 million. Overnite currently has a $12 million revolving credit agreement, of which it is utilizing just $2.3 million. Even with further reductions in debt financing, the company intends to maintain the revolver availability.

Table 16

Funds Flow Summary/Projection
(In millions)

	1971	1972	1973	1974	1975	Estimated 1976
Net income	$ 7.43	$ 8.27	$ 7.65	$ 8.30	$ 6.15	$ 9.00
Dividends	1.58	1.87	2.09	2.33	2.44	2.48
Retained earnings	$ 5.85	$ 6.40	$ 5.57	$ 5.97	$ 3.71	$ 6.52
Depreciation	3.71	4.61	5.60	6.65	7.40	8.00
Deferred taxes	0.44	0.76	0.72	0.77	0.88	1.00
Deferred ITC	0.23	0.32	0.32	0.36	0.09	0.10
Total operating sources	$10.23	$12.09	$12.21	$13.75	$12.08	$15.62
Disposal of property	0.44	2.00	0.95	1.41	0.81	0.70
Long-term debt, net	(2.37)	1.13	2.15	3.68	(2.14)	(3.30)
Total sources	$ 8.30	$15.22	$15.31	$18.84	$10.75	$13.02
Capital expenditures:						
Revenue equipment	$ 6.00	$ 8.24	$ 9.02	$11.99	$ 3.93	$ 4.50
Other	2.68	4.27	4.10	6.76	8.33	3.50
Total	$ 8.68	$12.51	$13.12	$18.75	$12.26	$ 8.00
Additions to franchises	0.03	0.14	0.12	1.08	0.77	1.00
Other	(0.48)	0.31	0.92	(0.10)	(1.15)	–
Total uses	$ 8.23	$12.96	$14.16	$19.73	$11.88	$ 9.00
Increase (Decrease) in Working capital	$ 0.07	$ 2.26	$ 1.15	($ 0.98)	($ 1.13)	$ 4.02
% of total uses provided by operating sources	124%	93%	86%	70%	102%	174%

Table 17 details selected balance sheet items.

(See Table 17 on following page)

Table 17

Balance Sheet Items
(In millions)

	1971	1972	1973	1974	1975
Cash	$ 1.67	$ 1.08	$ 1.74	$ 1.31	$ 1.08
Accounts receivable	4.22	4.84	6.80	5.23	5.84
Inventories	0.86	0.86	1.13	1.67	1.37
Prepaid expenses	0.53	0.76	0.84	1.07	1.22
Total current assets	$ 7.28	$ 7.55	$10.51	$ 9.29	$ 9.51
Total current liabilities	7.31	5.32	7.14	6.80	8.15
Net working capital	$ 0.03	$ 2.23	$ 3.37	$ 2.49	$ 1.36
Current ratio	0.99	1.42	1.47	1.37	1.17
Net tangible property	$28.78	$34.68	$41.25	$51.95	$56.05
Franchises & rights	0.73	0.88	1.00	2.06	2.78
Other assets	1.05	1.36	1.61	1.52	1.88
Long-term debt	$ 3.57	$ 4.70	$ 6.85	$10.53	$ 8.39
% of total capitalization	12%	12%	15%	18%	14%
Deferred taxes	2.81	3.90	4.93	6.06	7.03
% of total capitalization	9%	10%	10%	10%	11%
Stockholders' equity	24.15	30.54	35.45	41.42	46.64
% of total capitalization	79%	78%	75%	71%	75%
Total capitalization	$30.53	$39.14	$47.23	$58.01	$62.06
Book value per share	$ 8.05	$10.18	$11.81	$13.81	$15.03

Dividends

A record of interim dividend payments is furnished in Table 18.

Table 18

Dividend Record
(Per common share)

	1971	1972	1973	1974	1975	Estimated 1976	Estimated 1977
Dividends	$0.52	$0.62	$0.69	$0.78	$0.80	$0.80	$0.80
Earnings	2.46	2.74	2.54	2.78	2.03	3.00	3.50
Payout	21%	23%	27%	28%	39%	27%	23%

EXHIBIT D, ANNEXED TO COMPLAINT

Overnite's payout ratio has been rising in recent years, through a combination of higher dividend rates and earnings declines in 1973 and 1975. At the current dividend rate, the payout ratio would not be unusually low; however, if 1977 earnings reach the $3.50 per share level, the payout would drop back to 23%. Accordingly, it would not be surprising to see modest increases in the dividend rate in 1976 and 1977. This projection assumes, however, that Overnite will be accumulating excess funds into working capital throughout the 1976-1977 period.

H. C. WAINWRIGHT & CO.
Thomas A. Trantum

EXHIBIT E, ANNEXED TO COMPLAINT.

The Wall Street Transcript
May 17, 1976
Page 43,689

Thomas A. Trantum of H.C. Wainwright & Co. expects a stronger earnings pattern at **OVERNITE TRANSPORTATION CO.** (22) through 1976 and 1977, because of such factors as revenue improvement, cost cutting and the planned development of new business between Ohio and the Southeast, but he says the long term outlook is less certain.

Trantum estimates that Overnite Transportation will earn $3 a share this year, compared with $2.03 in 1975 and $2.78 in 1974.

Earnings were down in 1975, he says, because the carrier could not cut operating expenses enough to make up for a dropoff in revenues related to the recession. The company had kept up a no-layoff policy in the past, he says, while paying low wages to non-union employees. When Overnite Transportation tried to maintain the no-layoff policy last year, he says, profits were reduced to a point where some layoffs became essential.

Earnings began to improve last fall, Trantum says, because of stronger revenues and measures to reduce costs. Productivity gains are beging realized, he believes, and a favorable earnings trend should be maintained this year, with additional gains in 1977 as a result of recent additions to route authority and plans for developing new business between Ohio and the Southeast.

As for the longer term, Trantum says management must take several steps to improve its uneven earnings performance since 1971. He says it must expand its operating authority to cut its dependence on the Southeast, put greater stress on sales and refine and tighten its system of revenue and expense controls.

Trantum says progress is apparently taking place in all three areas, but he says it's too early to define the effects of the company's actions on long-term prospects.--OVERNITE TRANSPORTATION CO., Basic Report of H.C. Wainwright & Co. (Thomas A. Trantum), April 27, 1976. 26 pages. [RP2990]

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H.C. WAINWRIGHT & CO.
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SPECIAL REPORT

EARNINGS ESTIMATE REVISION
HERBICIDE SITUATION

April 28, 1976 — **MONSANTO COMPANY (MTC)**

Earnings (Years ending Dec. 31) (a)

Actual 1974	$ 9.25 per share	Recent price	92
Actual 1975	8.63 per share	1976 Range to date	98-76
Estimated 1976	11.80 per share	P-E based on 1976 estimate	8
Current annual dividend rate	2.80 per share	Yield	3.0%

(a) Primary. Fully-diluted earnings are: 1974 – $8.73; 1975 – $8.22; and 1976 – $11.15.

As had been rumored for the past few weeks, stronger than originally anticipated comparisons in non-agricultural lines gave Monsanto earnings of $4.40 per share in its seasonal peak first quarter, versus $2.79 in the corresponding 1975 inverval. This compares with the writer's recent expectation for results of about $3.80 and an original estimate of $3.40. Because the source of the variance in profits for this period lies mainly in the plastics and fibers areas, which are not subject to the extreme seasonality that characterizes the farm chemicals business, the implications for year-to-year profit increases in subsequent quarters also appear more favorable than had been forecasted earlier. Accordingly – and despite the likelihood of at least modestly negative comparisons in ag chemical results over the near term – the writer has increased his full year 1976 estimate from $10.00 per share (primary) to $11.80. The projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half, in line with H. C. Wainwright's expectations for trends in economic activity.

In 1977, a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major source of Monsanto's earnings. But such a development is quite speculative at this point and, in Monsanto's case anyway, the company has a material potential offset in its new preplant or post-harvest herbicide, "Roundup," which should be swinging into substantial black figures next year. On balance, it is likely that a much more potent influence on company results in 1977 will be the trend and level of economic activity and its impact on the non-ag sectors of the business.

Current Operations

Sales in the first quarter rose 29% from 1975's $913 million to more than $1.17 billion. Monsanto does not have an overall selling price index but, based on indexes for the Textile,

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Polymers & Petrochemicals and Industrial Chemicals groups, it appears that *companywide* realizations have improved 2%-3% since the end of 1975 – and possibly 6%-8% on a year-to-year basis. Physical volume, then, may have risen some 21% from the initial period of last year.

Pretax operating income was $272 million, up 62% from the previous record first quarter high of $168 million in 1975. Of this year-to-year gain of $104 million, Monsanto Textiles Company contributed one of the largest shares, having swung from an ultra-depressed $31 million deficit in the initial period of 1975 (the nadir of the textile recession) to an $11 million profit in the quarter just ended. An advance of equal magnitude was reported by the Polymers & Petrochemicals Company (plastic resins, mainly), where deflated year-earlier results helped produce an upswing of $42 million. All other non-ag divisions combined showed only a small year-to-year improvement, partly in light of the continuing losses being absorbed in certain Commercial Products operations (the Cycle-Safe bottle).

Monsanto Agricultural Products Company, as had been expected, registered a modest earnings improvement, with lower fertilizer results offsetting part of a "greater-than-10%" increase in herbicides operating income. First-quarter per share net broke down roughly as follows:

	First-Quarter E.P.S. (a)		
	1975	1976	% Change
Agricultural	$2.16	$2.41	+12%
Textile	(0.45)	0.18	–
Polymers & Petro.	0.06	0.78	N.M.
All other	1.02	1.03	+ 1
Total	$2.79	$4.40	+58

(a) Based on writer's estimates of tax rates by individual segment.

( ) Denotes deficit.

N.M. Not meaningful.

1976 Prospects

As indicated earlier, the fact that the *non-ag* portion of Monsanto contributed most to the superlative first-quarter performance augurs favorably for the near-term profit trend. This is the case not only because the non-farm chemical lines are less seasonal (and thus a strong first-quarter has greater forecasting value) but also because the Agricultural Company seems likely to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half.

Though the ag business will be discussed in more detail in a later section of this report, it should be noted here that this division's second quarter will bear the dual burden of comparison with a far healthier year-ago environment for nitrogen fertilizer, as well as the delayed effect of last December's early shipment program for herbicides which "borrowed" 22¢ per share of earnings from 1976 – in effect, all from the second quarter. Though some observers believe ammonia-based fertilizer prices will soon begin to firm, ample down-the-pipeline inventories have pressured realizations to a level down some 25%, year-to-year, and probably not too much of this shortfall can be made up in the brief remainder of the spring

shipping season. From a corporate point of view, Monsanto has been able to offset some of the impact of reduced ammonia prices by diverting more of this material to the production of fiber intermediates, but from the standpoint of the *Ag Company* bottom line, all such a policy does is add the effect of lowered volume to that of cut prices. Thus, overall ag earnings should drop at least modestly – and *perhaps* by as much as 30¢-40¢ per share – from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries.

As may be agreed by long-time observers of Monsanto, the forecasting of the company's earnings at or near cyclical turning points presents some challenge. With pretax (non-ag) operating margins of only 11% even under 1974's preternaturally sanguine conditions, Monsanto has considerable sensitivity to swings in demand. Right now, of course, the swing is strongly upward and the challenge to analysts is to keep up with the bottom-line impact of favorable conditions without succumbing to the temptation to engage in a little straight-line extrapolation. Though the timing is hard to pinpoint, there are signs pointing to a rebirth of more rapid inflation in industrial prices (and costs), and some slackening in the rate of gain in corporate unit volume and profits, probably beginning in the second half. If events develop along these lines, Monsanto can be expected, as always, to be a bellweather of change in the economic climate.

Under such a set of circumstances, at least one important segment of the company may have already seen its peak demand months; synthetic fibers customarily lead changes in the general economy by up to a year. Considering also that the first quarter of 1975 was by far the low of the past cycle (for non-ag businesses) and that subsequent quarterly comparisons will become much less easy, there are grounds for expecting progressively less robust earnings increases from this point on – for both non-farm chemical lines and Monsanto overall – with some possibility of a year-to-year decline in results in the fourth quarter.

These basic assumptions underlie the writer's 1976 projections as presented in the following table.

(See table on following page)

Table 1

Monsanto
1976 Projection

	1974			1975			1976 Estimate			Sensitivity of E.P.S. to Changes in:
	Ag	Non-Ag	Total	Ag	Non-Ag	Total	Ag	Non-Ag	Total	
Net sales	$ 411 +45%	$3,087 +31	$3,498 + 32%	$ 547 +33%	$3,078 0	$3,625 + 4%	$ 570 + 4%	$3,780 +23%	$4,350 +20%	
Physical volume	+12%	0	+ 1%	+24%	−10%	−6%	11%	+15%	+14%	Prices − 61¢
Selling prices	+29%	+31%	+ 31%	+ 7% (a)	+11%	+10%	− 6% (a)	+7%	+6%	Volume − 36¢
Employment costs	$ 76 +20	$ 727 +15	$ 803 + 16	$ 90 +18	$ 803 +10	$ 893 +11	$100 +11	$ 890 +11	$ 990 +11	Feed. & energy − 12¢
Avg. no. employees			+2.6%			+0.8%			+1%	
Employment cost/employee			+13.1%			+10.2%			+10%	
Raw materials & services	$ 123 +38	$1,850 +44	$1,973 + 44	$ 169 +37	$1,843 0	$2,012 + 2	$ 192 +14	$2,226 +21	$2,418 +20	
Hydrofeeds & petrochem.	$ 29	$ 371	$ 400 +185	$ 34	$ 356	$ 390 − 2	$ 41	$ 442	$ 483 +24	
Unit consumption			0			+4%			+15%	
Unit cost			+185%			−6%			+8%	
Energy	6	189	195 + 50	8	244	252 +29	8	312	320 +27	
Unit consumption			−5%			−15%			+6%	
Unit cost			+58%			+52%			+20%	
Other raw materials	57	737	794 + 32	87	542	629 −21	98	669	767 +22	
Unit consumption			−9%			−16%			+14%	
Unit cost			+45%			−6%			+7%	
Services, etc.	31	553	584 + 8	40	701	741 +27	45	803	848 +14	
Depreciation	$ 10	$ 162	$ 172 + 1	$ 15 +50	$ 158 − 2	$ 173 −	$ 20 +33	$ 175 +11	$ 195 +13	
Operating income	$ 202 +66	$ 384 +22	$ 550 + 35	$ 273 +35	$ 274 −21	$ 547 − 1	$258 − 5	$ 489 +78	$ 747 +37	
Margin	49.3%	11.3%	15.7%	49.8%	8.9%	15.1%	45.3%	12.9%	17.2%	
Interest expense	−	43	43	−	56	56	−	80	80	
Other income	−	67	67	−	45	45	−	40	40	
Pretax income	$ 202 +66	$ 372 +28	$ 574 + 40	$ 273 +35	$ 263 −29	$ 536 − 7	$ 258 − 5	$ 449 +71	$ 707 +32	
Margin	49.3%	12.1%	16.4%	49.9%	8.5%	14.8%	45.3%	11.9%	16.3%	
Taxes	$ 88	$ 163	$ 251	$ 120	$ 110	$ 230	$ 106	$ 184	$ 290	
Rate	43.7%	43.7%	43.7%	44.0%	41.8%	42.9%	41.0%	41.0%	41.0%	
Net income	$ 114 +62	$ 209 +24	$ 323 + 36	$ 153 +34	$ 153 −27	$ 306 − 5	$ 152 − 1	$ 265 +73	$ 417 +36	
Preferred dividends	−	6	6	−	5	5	−	5	5	
Net to common	$ 114	$ 203	$ 317	$ 153	$ 148	$ 301	$ 152	$ 260	$ 412	
E.P.S. − primary	$3.33 +58	$5.92 +24	$9.25 + 34	$4.43 +33	$4.19 −29	$8.63 − 7	$4.35 − 2	$7.45 +78	$11.80 +37	
− diluted	−	−	8.73 + 33	−	−	8.22 − 6			11.15 +36	
Number of shares			34.2			34.5			34.9	

(a) All of change reflects fertilizer prices.

Note: Breakdown of costs between Ag & Non-Ag is writer's estimate.

Noteworthy in the preceding estimates is the probable offsetting effect of sharp increases in interest expense and the depreciation accrual (after eight years of near-stability at the $175 million level*) on the one hand and a material drop in the tax rate on the other. Reflecting a major increase in project completions, the investment tax credit is projected to jump from 1975's $22 million to about $40 million this year – an *increase* equivalent to approximately 2.7% on the tax rate, or 52¢ per share.

The Herbicide Situation

There is a certain irony in the current widespread concern over the prospects for herbicide profits since the degree of any anxiety on this score is inevitably proportional to the tremendous success of this line for most producers in recent years. This is nowhere more true than in the case of Monsanto, the greater part of whose huge ag chemical earnings is derived from corn/soybean herbicides. The data below provides some perspective on the significance of farm chemicals in general not only to total company profits but to its capital generating capability as well.

Monsanto Agricultural Products Company
(In millions)

	1971	1972	1973	1974	1975	Compound Annual Growth
Sales	$200	$222	$283	$411	$5[illegible]7	28.5%
Operating income	68	81	122	202	273	41.5
Margin	34.1%	36.4%	42.9%	49.3%	49.8%	
Operating income as % of MTC	38%	37%	30%	37%	50%	
Agricultural						
Estimated net income	$ 40	$ 49	$ 70	$ 114	$ 153	
Capital expenditures	8	15	12	20	90	
Rest of MTC						
Estimated net income	$ 54	$ 73	$168	$209	$153	
Capital expenditures	197	153	193	293	438	

The writer estimates that, but for the ag contribution to net cash generation, Monsanto would have had to increase by roughly $175 million the $227 million it has borrowed (net) over the past five years.

The next table attempts to draw a bead more narrowly on the relative importance of the corn/soybean herbicides ("Lasso" and "Ramrod") within the Agricultural Products Company's total business.

(See table on following page)

The accrual was beginning to rise in the early 1970's when management opted to switch to the straight-line method for financial reporting purposes.

EXHIBIT F, ANNEXED TO COMPLAINT

64a

Agricultural Chemicals 1975
(In millions)

	Sales		Oper. Income		Margin
Total	**$547**	**100%**	**$273**	**100%**	**49.8%**
Lasso/Ramrod	280	51	174	64	62
Other herbicides	97	18	48	18	50
Other pesticides	40	8	20	7	50
Fertilizers	100	18	25	9	25
Feed supplements, etc.	30	5	6	2	20

Source: Writer's estimates for individual lines.

In anticipation of the expiration of the "Ramrod" patent last December, Monsanto had been steadily de-emphasizing the product, putting its push behind the newer (and more broadly effective) "Lasso." As a result, the latter accounted for by far the larger portion of the $280-odd million of sales of the corn/soybean herbicides. By itself, then, "Lasso" is more important to Monsanto's bottom line than the entire Polymers & Petrochemicals group or the Textiles Company in its best year of the past five for which such figures are available.

Data such as these give point, if not poignancy, to the investor concern aroused by the termination this season of the tight supply conditions that had prevailed in the past few years and the resultant dilatory attitude of farmers toward buying their herbicide requirements. In its final survey of April 1, the Department of Agriculture discovered a further slight increase in farmers' planting intentions for corn (by far the most important crop use of herbicides); growers apparently plan to devote 82.7 million acres to this grain, up 6.2% from last year. However, while farmers are now said to be ordering heavily – and there seems to be no doubt that the economics of applying weed control chemicals are as favorable as ever (a 3- or 4-to-1 payback) – Monsanto's surveys show that as of the week of April 12, farmers had taken only 50% of their requirements versus over 80% at the same date in 1975. With the third week in April looming as the planting deadline in much of the Corn Belt – and a couple of weeks thereafter the latest date for application of pre-emergent herbicides – the question arises as to whether the distribution system can deliver all the product demanded in the time available. Equally at issue is the degree to which that demand will exceed last year's *ex* any delivery problem.

In general, like questions can be raised in the case of the soybean crop, but here the planting deadline is more distant – about mid-May – so that growers will presumably have the benefit of the herbicide availability experience for corn as a guide to the timing of their own orders. Here, though, the April 1 Department of Agriculture survey continued to indicate that acreage will show a drop on the order of 10%.

On the supply side, of course, there has been a major expansion in the capacity of herbicide producers. And because of the shortages that resulted in some lost business in each of the past two seasons, the buying pressure from distributors and dealers in advance of the present season resulted in much of this new capacity being utilized. Unfortunately, statistics are very scanty, but this observer believes that most producers have increased capacity between 25% and 50% in the past two years. (The first phase of Monsanto's 50% expansion in "Lasso" capacity came on stream in advance of the 1975 season, and the larger, second phase is

scheduled for third-quarter 1976 completion.) And at least two of the leading manufacturers – Monsanto and Stauffer – were operating "flat out" going into this spring. This is against the background of a market that, at best, has had about a 15% growth rate.

Accordingly, whether or not all of the herbicide demanded by corn growers can physically be delivered in time, there is considerable doubt as to size of the probable carryover of inventories (at the distributor and dealer levels, primarily) at the close of the current season in June. Because the success of 1976 for the manufacturers was an accomplished fact in advance of this season, downstream inventories are largely a problem for next year.

Of course, there is room for substantial variation in the results of individual companies. Most expect to do better than the industry. In Monsanto's case, such an expectation at least has the support of a record of increasing market penetration to date. By its own account, the company's share of the herbicide-treated acreage planted to corn and soybeans has grown as follows (the 1976 estimates are those of the writer):

Corn/Soybean Herbicide Market & Monsanto Share
(Acres in millions)

Crop Years	1973	1974	1975	Estimated 1976
Corn				
Acres planted	71.9	77.8	77.9	81 approx.
Acres treated with herbicides	62.6	68.5	68.6	72
Percent of acres planted	87%	88%	88%	89%
Acres with broadcast application	44.4	50.7	51.5	55
Percent of acres treated	71%	74%	75%	76%
Acres treated with Lasso/Ramrod	20.7	22.6	24.0	26
Percent of acres treated	33%	33%	35%	36%
Soybeans				
Acres planted	56.7	53.6	54.6	50 approx.
Acres treated with herbicides	46.5	45.0	47.0	43
Percent of acres planted	82%	84%	86%	86%
Acres with broadcast application	28.4	27.5	29.1	27
Percent of acres treated	61%	61%	62%	63%
Acres treated with Lasso/Ramrod	10.2	10.8	14.1	14
Percent of acres treated	22%	24%	30%	32%

Two factors should be borne in mind in appraising the statistics in the preceding table. First, Monsanto's "share" is a fairly accurate measure of the acres treated with "Lasso" or "Ramrod" but, of necessity, there is no attempt to adjust the percentages for the very great extent to which these materials are applied by farmers in combination with competitors' products to give protection against a broader spectrum of weed types. Thus, comparable

percentages for all herbicide producers would add to a total very much in excess of 100%. Secondly, the growth in the broadcast application method (i.e., covering the entire field) is important in that it requires two to three times as much herbicide as does banding (spraying only the crop rows).

The writer's own belief is that farmers' demand for Monsanto's corn/soybean herbicides will be up sharply this season, but that delivery problems in the time available will result in some lost business. Obviously, no one can be sure of the accuracy of judgments of this type, but for the purposes of the figures used in arriving at our estimate of Monsanto's 1976 ag earnings, the company's sales of "Lasso"/"Ramrod" to distributors and dealers were put at a level 15% above 1975. Dollar sales and physical shipments of these herbicides will show the same percentage change this year, as the last price increase took place in 1974, (Monsanto having opted not to participate in a second round of industry price hikes last summer). At the same time, the writer believes there to be a real risk – perhaps an odds-on one – that dealers' deliveries to farmers will fail to match the 15% increase in their purchases from Monsanto.

1977 Prospects

Agricultural. As indicated earlier, any inventory carryover from this spring will be predominantly a 1977 problem for the manufacturers. Monsanto estimates that the carryover of corn/soybean herbicides will be 15%-20% (of prior-season requirements) versus 13% at the end of the 1975 crop year and a smaller percentage in 1974. Whether a carryover, of, say, 20% would be sufficient to induce a proliferation of discounting, special promotions, etc., at the manufacturers' level next winter is a matter of speculation. There has not been a comparable set of circumstances in recent years, and it has been something of an article of faith that the proprietary nature of the products was proof against the kind of price deals that regularly afflict commodity plastics and fibers, for example. In this observer's opinion, there is nothing inherent in a proprietary herbicide that would shield it from price competition *if* there are at least several products of acceptable efficacy available to the market (as there are) and they collectively come into oversupply (which they may).* Definitive information as to the size of the carryover will not become known until after Monsanto conducts its August survey of stocks in the hands of dealers and farmers, but if their inventories do wind up the season at burdensome levels, the fact is likely to become rather quickly known throughout the industry by June or July. It will be something to monitor.

The extent to which competitiveness in pricing may develop next season will also be a function of the trend in demand in the 1977 crop year. Monsanto itself concedes that some of the several growth factors are close to playing themselves out. Relatively little new acreage can be added to the aggregate already devoted to the key herbicide-using crops – corn, soybean and cotton. Similarly, the percentage of planted acreage treated with weed control

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**As a sidelight of this subject, 1977 will be the first commercial marketing year for "Prowl," American Cyanamid's new pre-emergent soybean herbicide. Preliminary indications are that "Prowl" has no great competitive edge, which may heighten the risk of a "price" approach to marketing.*

chemicals is probably approaching a practical high near 90%. There probably is some further "mileage" in the switch from banding to broadcast application. And from Monsanto's standpoint, at least, there is some added potential for wider use of "Lasso," which is most effective against grassy-type weeds, in combination with broadleaf-type herbicides that are currently being applied alone by some farmers. The company estimates that about half of the treated corn/soybean acreage is *not* being treated with grassy-type herbicides.

Even so, growth in overall domestic demand for corn/soybean herbicides is seen (by Monsanto and this observer) as receding to perhaps a 5% pace within the next couple of years. Faster growth is possible in foreign markets but these have yet to prove important for "Lasso"-type products.

The company expects that beyond this year, the slack in its ag chemical growth will be taken up by rapidly expanding sales of some of its other products. These include such items as "Machete," a rice herbicide; "Avadex," a product against wild oats in wheat regions; and "Polaris," the growth regulator developed for sugar cane.

But much more important is "Roundup," the company's first -- and assertedly the industry's first effective -- non-persistent herbicide for control of perennial weeds such as Johnson grass and quack grass. Many of these weeds have proved highly resistant to earlier products of other manufacturers, but proper application of "Roundup" (either before planting or after harvest) has been found to effectively destroy the entire root system of such weeds, yet with the herbicide becoming inactivated on contact with the soil and thus posing no threat to the subsequent crop or the environment.

The first year of commercial sales of "Roundup" was 1975, and some of the vital statistics of the herbicide are as yet indeterminable; for example, it is said to be so effective that it may possibly require only biennial or triennial application. Such considerations, as well as the breadth of its ultimate crop clearances, obviously affect the projectable size and growth of its market. Even so, Monsanto believes that "Roundup" can eventually exceed the size of "Lasso," especially as, unlike "Lasso" it has large potential markets abroad. (In fact, its initial applications have been in Malaysia in rubber and palm plantations.)

Management estimates that sales will reach the vicinity of $30 million this year, up from $10 million in 1975, with a further impressive, if smaller, percentage increase likely in 1977. During 1976, little, if any, of the expansion in "Roundup" volume is believed likely to carry down to the bottom line, since the Ag Products Company is expending many profit dollars on sampling and other marketing costs. Thereafter, however, the company believes that there is no reason to expect that margins on "Roundup" will differ from the kind of spreads associated with other proprietaries such as "Lasso."

It is obviously early to attempt a projection of Monsanto's farm chemical profits in 1977. But it is apparent, on looking around the industry, that there are few, if any, rivals who have major new products coming along in time to hold promise of constituting material offsets to the possible development of growth and pricing problems in the pre-emergent corn/soybean herbicide sector. Assuming (a) a recovery in ammonia pricing to a level intermediate between the spring 1975 highs and current realizations; (b) an increase of only 5%, say, in the ongoing income from established herbicides and other non-fertilizer products; and (c) a positive swing of $25 million in the operating contribution of "Roundup," Monsanto's 1977 ag results would fall in a range of $4.75-$5.00 per share, versus the 1976 estimate of $4.35.

Adopting a more pessimistic scenario – which *could* prove justified – Ag earnings of $4.00-$4.25 per share would follow from the premise of (a) no recovery in ammonia prices; (b) a 15% drop in "Lasso"/"Ramrod" profits; (c) a 5% gain in other non-fertilizer ag products; and (d) a $15 million positive swing from "Roundup." Such a contraction in corn/soybean herbicide results would probably occur only if some pricing (discounting) pressures develop next season at the manufacturers' level.

Non-Ag Business. It can be appreciated that, in a business with margins as sensitive to the winds of economic change as Monsanto's, results in 1977 will be very deeply shaped by the slope of the real GNP curve going into next year. And there have seldom been wider divisions among forecasters as to the implications of the several "scenarios" for chemical output. DuPont, for example, is projecting back-to-back increases of 12% in the industry's production for 1976 and 1977. In our view, a gain on the order of 13% this year will be followed by one of possibly 5% in 1977, in consonance with the H. C. Wainwright economic construct.

The slowing in prospective chemical output has at least two major implications for companies such as Monsanto. First, there will be a marked reduction in the favorable volume leverage that is bolstering current margins. Secondly, with an increasing number of expansion projects (initiated on the heels of the 1973-1974 surge in profits) coming on stream, a gain of only, say, 5% in output would fall somewhat short of "filling" the industry's increment to productive capacity, and operating rates could actually decline slightly from the low 80's projected for 1976. This in turn would inhibit the rate at which inflating operating costs can be matched by price increases. In sum, the projected conditions would point to a mild contraction in margins in 1977 and only a modest increase in chemical profits. (In contrast, under a DuPont-type economic environment, shortages would probably begin to reappear in some sectors by the second half of next year, prices would undoubtedly reflect such a prospect, and earnings would continue the 1976 renaissance.)

There is little reason to believe that in its non-farm-chemical activities, Monsanto would follow a pattern substantially different from that sketched above for the industry. In 1976, for example, there should be a reasonably close (non-ag) correspondence between the company and its industry in both physical volume (+15% for Monsanto, vs. +13% for the industry) and selling prices (+7% for the company, +6%-7% for the industry), though because of its high operating leverage, Monsanto's projected total earnings gain of 37% is about one-third greater than that forecast for all of the twelve major chemical companies in the H. C. Wainwright coverage. Based on our industry view for 1977, therefore, Monsanto could be expected to produce non-ag results not much higher than the $7.45 per share now estimated for 1976. Giving effect to the very broad band of both economic and internal operating variability affecting results this far ahead, it obviously makes better sense to apply a range to possible earnings. In this case, $6.50-$8.25 per share seems reasonable, though the "sensitivity" factor should be borne in mind: each 1% by which selling prices fluctuate from a given estimate affects the bottom line by more than 60¢ per share.

Looking at both the Agricultural Company and other product segments together, then, it seems possible that overall 1977 earnings could fall in the range of $10.50 to $13.25 per share.

H. C. WAINWRIGHT & CO.
W. D. Williams

EXHIBIT G, ANNEXED TO COMPLAINT.

The Wall Street Transcript
May 24, 1976
Page 43,789

In a Special Report from H. C. Wainwright & Co., W.D. Williams writes that he has increased his full year 1976 estimate for **MONSANTO COMPANY** ($92) from $10.00 per share (primary) to $11.80, due to greater strength in the plastics and fibers area than was previously anticipated. The new projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half. In 1975, EPS were $8.63. However, the Monsanto Agricultural Products Company seems likely, in the analyst's opinion, to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half. Overall ag earnings should drop at least modestly - and perhaps by as much as 30c-40c per share - from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries.

Mr. Williams believes it is possible that 1977 EPS could fall in the $10.50-13.25 range, with the most potent influence on company results being the trend and level of economic activity and its impact on the non-ag sectors of the business. However, the analyst cautions that a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major source of Monsanto's earnings. Depending on the set of assumptions used, Monsanto's 1977 ag results might fall in a range of $4.75-5.00 per share or in the $4.00-4.25 per share range (versus the 1976 estimate of $4.35).-MONSANTO COMPANY, Special Report, H. C. Wainwright & Co. (W. D. Williams), April 28, 1976, 10 pages. [RP 3063]

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SPECIAL REPORT

Report on Technical Findings

April 30, 1976

EASTMAN KODAK (EK)
POLAROID CORPORATION (PRD)

A Program To Study The Forthcoming Competition In The Self-Developing Segment of The Amateur Photographic Market

The initial phase of our program to evaluate the emerging competition in the instant photographic market consists of a technical evaluation of the relative merits of the Eastman Kodak and Polaroid camera and film lines. To assist in this study, H. C. Wainwright & Co. has retained outside consultants in order to gain access to necessary laboratory facilities and assure the highest level of technical expertise. The ensuing phases of this evaluation program entail monthly surveys of retail outlets in ten domestic cities, measuring the market shares of the Kodak and Polaroid *litter-free* instant cameras.

Evaluation of Comparable Equipment Lines

Because of the immediate availability of the EK6, which is positioned in the middle of the Kodak self-developing camera line, and its comparability in terms of price and overall capability with the Pronto, Polaroid's least expensive unit, initial equipment evaluation is based entirely on these two models.

Physical Aspects

In terms of physical characteristics, the Polaroid Pronto is generally superior to the EK6. The Pronto is a substantially lighter 16 ounces, as against 29.1 ounces for the EK6. Although relative size is difficult to evaluate because of differing shapes, the Pronto is also less bulky, with a base of only 5.4 inches in length, compared with 6.3 inches for the EK6.

The holding methods for the two cameras differ considerably. The Pronto method is technically superior in terms of resulting picture quality, because it produces less camera motion relative to the EK6. Specifically, the Pronto technique requires the photographer's hands to be in different planes, whereas the EK6 employs a more symmetrical holding technique. In addition, for shutter activation, the Pronto requires an opposing "pinching"

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motion of the thumb and forefinger, resulting in a stabilizing counterforce. The EK6 shutter, on the other hand, is activated by a downward, single-direction movement which tends to create camera motion.

Shutter Speed

While the Pronto and EK6 shutters are both electronically operated, the Kodak shutter is significantly faster, as indicated below.

Shutter Speed

Camera	Shutter Speed Range
EK6	1/300-1/20 second
Pronto	1/125-1 second

The faster EK6 shutter is made possible by the faster speed of the Kodak PR-10 film and represents an important aspect of the EK product design. The higher incidence of camera movement (resulting from the less stable holding technique) and the use of a textured print finish (discussed later in this report) both tend to lower sharpness and definition of the PR-10 image; the faster speed of the EK6 shutter partially offsets these disadvantages by reducing the impact of camera and subject movement.

Distance Focusing

Eastman Kodak has taken an important step toward solving one of the major problems of the self-developing market – the seeming inability of the photographer to accurately focus his instant camera for distance. While the Pronto requires measuresment of subject-camera distance without visual aids, the EK6 contains an adjustable circle that exactly encompasses one adult subject's head – thus offering a convenient and simple focusing mechanism, as well as a method of centering the primary subject. This system presents two potential problems, however. First, the generally unsophisticated instant photographer may attempt to adjust the size of the circle for significantly smaller or larger objects, thereby causing inaccurate distance focusing. Second, the focusing mechanism requires finger movement across the front of the camera immediately prior to activation of the shutter lever, which could increase the incidence of unwanted camera movement.

While the Pronto does not possess this useful focussing capability, it seems to have other advantages that offset this lack. First, as shown below, the Pronto f/stop range is much wider, with most of the difference being at higher levels. In addition, when taking flash pictures, the EK6 will remain at the lower f/11 setting.

Exposure Settings

Camera	f/Stop Setting
EK6	f/11 and f/16*
Pronto	f/9.4 to f/22**

** Operates at only f/11 for indoor flash usage. Without flash, may operate at either of two settings shown.*

*** Operates over complete indicated range for indoor and outdoor usage.*

As a result, in many instances, the Pronto will operate at a higher f/stop than the EK6; furthermore, the lens focal length of the Polaroid unit is shorter (116 mm versus 137 mm for the EK6). These two features give the Pronto a longer depth-of-field than the comparable Kodak unit, thereby allowing a significantly greater margin for focusing error. This fact was verified by extensive testing.

Flash Range

The distance range for indoor flash pictures is considerably greater for the Pronto, 3-12 feet, compared with 4-10 feet for the EK6. This strict limitation of the EK6, which is indicated in the directions accompanying the Kodak product, was verified in testing. Subject-camera distance outside this range resulted in significant overexposure or underexposure. Thus, the photographer is more likely to inadvertantly move outside this critical range with the EK6 than with the Pronto, causing a greater incidence of unsatisfactory prints. This restriction also reduces the subject area that can be included in the EK6 print; in fact, even at equal distance the EK6 print will cover considerably less subject area.

Comparison of Print Characteristics

Physical and Operational Aspects

The print developed by the Kodak PR-10 film is rectangular, while that of the Polaroid SX-70 film is square. As shown below, the SX-70 image is slightly larger.

Image Dimensions and Size

Film	Dimensions	Area in Square Inches
PR-10	2 5/8" x 3 9/16"	9.35"
SX-70	3 1/8" x 3 1/8"	9.77"

The PR-10 film is 50% faster than the SX-70 film, and thus requires less light for exposure, while (as previously mentioned) allowing a faster shutter range on the EK camera line. Development time in both instances is about the same, taking 8-10 minutes for full development.

Print Quality and Color Rendition

To circumvent Polaroid's formidable patent protection, Kodak developed an entirely new chemistry for its self-developing PR-10 film. One of the principal differences is that the PR-10 film absorbs light from the back of the print rather than the front. This reversed process results in somewhat different picture characteristics. First, the Kodak print is covered with a textured finish, dubbed "Satinlux," similar to the silk finish utilized on most conventional still pictures; this finish imparts a "softer" quality to the image. (If light were absorbed through the front of the print, the textured finish would break up the light rays, causing an unacceptable picture.) This finish also reduces the incidence of glare and fingerprints, characteristics of Polaroid prints so annoying when fully developed pictures are viewed.

Conversely, microscopic examination clearly reveals that the PR-10 image lacks the contrast and sharpness of the SX-70 picture. Two factors are probably responsible. First, the "Satinlux" finish somewhat obscures the final image more than the glossy coating used on the present SX-70 print. Second, the higher speed of the PR-10 film seems to increase the grain in the developed picture, thereby reducing image sharpness.

With regard to color rendition, the "hotter" segment of the color spectrum – principally-reds, yellows and pinks – are more accurately and attractively portrayed in the SX-70 image. In fact, these colors dominate the Polaroid picture. The PR-10 image, however, depicts the "softer" greens and blues more accurately. As a result, the PR-10 image appears to be superior for outdoor use where greens and blues are more prevalent. Further, the "softer" appearance of the Kodak picture, stemming from its textured finish, seems to produce more pleasing skin tones compared to the dominance of the bolder reds in the SX-70 print.

Lens Focal Length/Image Diagonal Relationship

As shown below, while the image diagonal (distance between opposite image corners) is greater for the PR-10 print, the focal length of the EK6 lens more than compensates for this small difference.

Lens Focal Length/Image Diagonal Relationship

Camera	Image Diagonal	Focal Length	Lens Focal Length/ Image Diagonal
EK6	113 mm	137 mm	1.21
Pronto	110 mm	116 mm	1.05

Because the ratio of lens focal length to image diagonal is greater for the Kodak system, the Kodak picture is less likely to suffer from underexposure around the outer portions of the developed picture because of insufficient light. This unpleasant effect is discernible in a significant portion of SX-70 images.

Comparison of Flash Systems

The Flip-Flash system used on the EK instant line (as well as other Kodak still cameras) is rotated so that only the four bulbs (of an eight bulb set) located at the top of the vertically

positioned flash unit are used. (The Pronto and SX-70 camera employ a horizontally positioned flash bar.) This system creates a greater flash-subject-lens angle relative to the Polaroid flash bar While less compact, this greater angle has two principal advantages. First, the incidence of "red eye" (light reflected into the subject's eyes and directly back to the camera lens causing the subject's eyes to appear red in the finished print) is reduced. Second, the system limits general overexposure, which has always been a major problem in self-developing photography, and the amount of overexposure therefore is greater for the SX-70 print than for the PR-10 picture.

Conclusions

The array of characteristics exhibited by the Polaroid and Kodak instant cameras and films and the fact that neither system has proven technically dominant makes it difficult to arrive at an exact conclusion as to the superiority of either system. Nevertheless, the results outlined above support the following conclusions.

(1) Technically, the Polaroid Pronto is believed to be superior to the Kodak EK6. The Pronto's smaller size and lower weight, more stable holding method, greater dept-of-field, and longer flash range seem to outweight the faster shutter speed and unique focus system of the EK6.

(2) Conversely, the overall quality of the PR-10 print seems to be higher than that of the SX-70 print. The "softer" appearance of the PR-10 image, the reduction of glare and fingerprints, better outdoor results because of superior blue and green rendition, and the more pleasing portrayal of skin tones offers generally more attractive images than the sharper, red-dominated SX-70 pictures.

(3) Of less importance, the greater flash-subject-lens angle of the Kodak Flip Flash system clearly makes it superior to the Polaroid flash bar in reducing both "red eye" and general overexposure.

It must also be emphasized, however, that despite the seeming validity of the above conclusions, it is this analyst's opinion that *neither Kodak or Polaroid has yet established an overall or overpowering technical advantage. This being the case, additional new product introductions and the relative success of future marketing efforts could prove as crucial in determining ultimate market shares as any current technical advantage.*

Major Questions Remain Unanswered

Notwithstanding the Kodak introduction and subsequent comparative tests of Kodak and Polaroid products, the following important questions remain unanswered.

(1) The lack of equipment and data render the exact relationship between the more expensive Kodak EK8 camera to be introduced this fall and the comparable Polaroid unit largely conjectural. The indicated dealer price of $90-$95 suggests that this top-of-the-line model may be directly positioned against the SX-70 Model 3, but evaluation must obviously wait until actual introduction of the EK8.

(2) The potential popularity of the EK4 "crank" model cannot be adequately assessed at this time. While Kodak expects this bottom-of-the-line unit to generate substantial volume, and thereby enlarge its total camera population, it is not clear whether the consumer will be willing to forego automatic print ejection for a $10-$15 savings. Substantial interest in the EK4 might force a competitive reaction from Polaroid – one which will present a problem because of the presence of the power source in the SX-70 film pack rather than the camera. A complete answer to this question must await our monthly surveys designed to determine the relative Kodak and Polaroid domestic market shares in the litter-free equipment field and the mix of camera models sold by each company within a competitive enviroment.

(3) Further tests are currently under way to determine whether the new SX-70 film now being distributed in selected geographical markets will substantially alter the conclusions reached above concerning the relationship between the competitive films. To date, Polaroid has announced only that this instant film possesses a new anti-glare coating and wider temperature range in which development can be achieved without light adjustment. Results of these tests will be published shortly.

H. C. WAINWRIGHT & CO.
Roy D. Burry

EXHIBIT I, ANNEXED TO COMPLAINT.

The Wall Street Transcript
May 31, 1976
Page 43,845

In a Special Report from H.C. Wainwright & Co. on the subject of **EASTMAN KODAK** and **POLAROID CORP.** Roy D. Burry presents a technical evaluation of the relative merits of the KODAK and POLAROID camera and film lines. Burry says the firm has retained outside consultants for this purpose. His initial equipment evaluation is based on a comparison between KODAK's EK6 and POLAROID's Pronto.

Physically, the Pronto is superior due to lighter weight and less bulkiness. He says holding methods differ, with the Pronto method superior in terms of resulting picture quality due to less camera motion. The EK6 shutter is faster, with a top speed of 1/500 second, while Pronto's best speed is 1/25 second. Burry says this speed, made possible by KODAK's faster film, is an important aspect of the product design, and offset the disadvantage of the holding method. Also, the EK6 offers a simple mechanical means of estimating distance important to achieving good focus. On the other hand Pronto has a wider f/stop range, giving it a wider depth of field. Flash range is greater for the Pronto (3-12 ft.) versus the EK6's 4-10 ft.

The KODAK film is rectangular and has slightly less total area than the square POLAROID film. The KODAK film is faster, and both have about the same development time (8-10 minutes). Burry explains the differences in color rendition, with KODAK providing a softer quality with the greens and blues more accurate, while POLAROID gives better reds and oranges and better contrast. In flash pictures, the KODAK system allows a greater angle and less red eye effect than the POLAROID. Burry concludes that neither KODAK nor POLAROID has established an overall or overpowering technical advantage over the other. He says many quenstions remain unanswered, and that more study will be required.–EASTMAN KODAK and POLAROID CORPORATION, Special Report on Technical Findings, H.C. Wainwright & Co. (Roy D. Burry),. April 30, 1976, 6 pages. [RP 3106]

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EXHIBIT J, ANNEXED TO COMPLAINT

H.C. WAINWRIGHT & CO.
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BASIC REPORT

June 15, 1976

C.I.T. FINANCIAL CORPORATION (CIT)

Earnings (Years ending Dec. 31) (a)

Actual 1974	$4.02 per share	Current price	31
Actual 1975	4.08 per share	1976 Range to date	35-29
Estimated 1976	4.60 per share	P-E based on 1976 estimate	7
Current annual dividend rate	2.20 per share	Yield	7.1%

(a) Fully diluted earnings including, in 1975 and 1976, adjustment for FASB Statement #8 relating to foreign currency translation. Pre-adjustment "operating earnings" are $4.21 per share in 1975 and an estimated $4.50 a share in 1976.

Commentary

Although the all-important short-term borrowing cost variable plummeted in 1975, C.I.T. Financial Corporation achieved operating earnings growth of only 5%, as a collapse in Banking and Property & Casualty Insurance profitability almost offset the excellent Finance, Manufacturing and Merchandising, and Life & Health Insurance earnings gains. This year, although short-term interest rates may soon trend significantly higher, C.I.T.'s (pre-currency adjustment) operating profits may advance about 7%, led by at least a moderate earnings gain in the Finance Division and some improvement in profitability at National Bank of North America (NBNA).

Clearly, NBNA is a maturing institution, and its earnings growth will not match the outstanding record of the 1965-1974 period. Nevertheless, substantial recovery should be evident in 1977, and over the longer term, the bank should continue to play a key role in partially buffering the effect of fluctuations in short-term interest rates on the Finance Division. Consequently, C.I.T.'s earnings balance and stability, which has produced remarkably steady compound profit growth averaging 5% annually over the past 25 years, should continue to be evident. In fact, some improvement in the corporate return on investment should result from the expected recovery in banking profits and by remedial actions taken in the small, but burdensome, Property & Casualty Insurance area.

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Consolidated earnings growth for C.I.T. might average about 6% annually in the future, with cash dividend payments about keeping pace. As has been the case in the past, the strongest annual earnings gains are likely to come during periods of relatively low or declining short term interest rates.

Review of 1975 Results

C.I.T.'s operating earnings per share increased 5% to $4.21 last year from $4.02 in 1974, as strong gains in Finance and Manufacturing and Merchandising profits offset a collapse in Banking profitability and a moderate decline in consolidated Insurance earnings. Quarterly comparisons are outlined below. The subsequent analysis of divisional performance deals only with originally reported operating earnings, and disregards the retroactive restatement of results made necessary by FASB Statement #8, although adjusted quarterly results are also presented in the table below.

(See table on following page)

EXHIBIT J, ANNEXED TO COMPLAINT

-3- C.I.T. FINANCIAL CORPORATION

Quarterly Net Income Comparisons
(In thousands)

	Finance	Banking	Insurance	Manufacturing & Merchandising	(a) Total Operating Earnings	Operating Earnings Per Share (b)	FASB #8 Adjustment (c)	Restated Earnings Per Share (b)
1974								
First quarter	$11,417	$ 6,155	$ 3,357	$ 1,341	$20,915	$0.97	N.A.	N.A.
Second quarter	9,800	6,475	3,602	2,896	21,400	1.00	N.A.	N.A.
Third quarter	7,175	6,709	3,941	2,443	18,893	0.88	N.A.	N.A.
Fourth quarter	10,991	5,675	4,337	5,380	25,008	1.17	N.A.	N.A.
Full year	$39,383	$25,014	$15,237	$12,060	$86,216	$4.02	N.A.	N.A.
1975								
First quarter	$12,201	$ 5,651	$ 3,388	$ 1,557	$21,336	$0.99	($ 787)	$0.96
Second quarter	13,088	4,401	2,806	2,952	21,768	1.02	(2,302)	0.90
Third quarter	11,874	2,829	3,334	3,509	19,975	0.93	118	0.94
Fourth quarter	16,781	1,256	3,843	7,002	27,301	1.27	169	1.28
Full year	$53,944	$14,137	$13,371	$15,020	$90,380	$4.21	($2,802)	$4.08
1976								
First quarter	$15,995	$ 2,838	$ 2,623	$ 2,337	$22,198	$1.03	$3,517	$1.20
% Change from year earlier								
1975								
First quarter	+ 7%	– 8%	+ 1%	+16%	+2%	+2%	–	–
Second quarter	+34	–32	–22	+ 2	+2	+2	–	–
Third quarter	+65	–58	–15	+44	+6	+6	–	–
Fourth quarter	+53	–78	–11	+30	+9	+9	–	–
Full year	+37	–43	–12	+25	+5	+5	–	–
1976								
First quarter	+31	–50	–23	+50	+4	+4	–	+25

(a) Net of interest expense applicable to carrying of non-consolidated Banking and Manufacturing & Merchandising subsidiaries.
(b) Fully diluted.
(c) Not significant prior to 1975, so that no restatement of prior-year results will be made.
N.A. Not available.

Lower Borrowing Costs Lift Finance Profits

Chiefly reflecting the sharp decline in short-term interest rates, Finance Division earnings in 1975 surged 37% to $53.9 million from $39.4 million the previous year. The all-important average cost of short-term debt plummeted to 6.80% from 1974's lofty 10.02% mean, and aggregate interest expense *fell* more than $40 million last year.

Loan growth was not particularly impressive; net receivables increased by only $127 million (+4%) to $3.2 billion. Outstanding gains of $159 million in industrial financing and leasing and $86 million in commercial financing and factoring were offset by net declines in personal loans and mobile home outstandings, as consumer loan demand remained quite weak until

late in the year. In line with the company's coutinuing strategy of reducing commitments in certain types of financing, both auto loans and wholesale financing obligations declined noticeably.

Operating expenses rose 9% in 1975, somewhat faster than the recent-year pace, reflecting installation costs of the CITATION on-line computer network in the personal loan offices and inflationary increases in most operating charges across the board.

Not unexpectedly, net chargeoffs increased in the weak domestic economy. However, net losses of $29.6 million were still a quite manageable 0.93% of average net receivables, not far above the $25.4 million (0.83%) burden of 1974. Consequently, the provision for losses climbed less than $4 million to $31.3 million.

Thus, thanks to the sharp drop in borrowing costs, pretax income jumped a healthy 43% and, even after a somewhat higher tax rate (48.5% versus 46.2%), net Finance income expanded an impressive 37%.

Bank Earnings Collapse

National Bank of North America's (NBNA) profitability was sharply reduced in 1975, as the declining prime rate, erosion in domestic loan volume, and markedly higher loan losses combined to create perhaps the most difficult operating conditions in the bank's history. Profits fell 43% to $14.1 million from $25.0 million in 1974, with quarterly earnings declining progressively from their third-quarter 1974 peak.

As a low-leveraged, largely domestic bank with a strong retail base, NBNA's interest sensitivity lies very heavily on the asset side (currently, interest sensitive assets outweigh interest sensitive liabilities by a hefty margin of roughly $800 million). Consequently, lending margins were squeezed by the sharp drop in interest rates last year, as the mean prime fell to 7.9% from 1974's 10.8% average. Exacerbated by the incremental loss of $6.0 million in interest income on non-accrual or renegotiated loans (a total of $16 million in 1975 compared to $10 million in 1974), the bank's net interest margin, although still a relatively high 4.40% (reflecting the substantial retail base of demand and savings deposits), fell appreciably from the 4.91% level of 1974. In addition, average earning assets advanced only 2% above the 1974 mean, so that the bank's net interest income *declined* 9% to $110 million in 1975.

Non-interest revenue posted good growth, as the important service charges on deposit accounts category climbed 11% to $9.7 million. "Other revenue" jumped 34% to $10.2 million, largely reflecting a substantial reduction in the bond trading account loss to $0.1 million from $1.2 million in 1974, and a good increase in International department fee income.

Non-interest expenses were fairly well controlled, increasing 8.9%, as increments to total compensation, occupancy, and supplies & services were held to 8.3%, 6.7%, and 8.1%, respectively. The "other expense" amalgam climbed a more significant 14.9%, reflecting inflationary increases in a wide range of expenses across the board, as well as a $1 million hike in equipment rental costs (related to new computer systems).

However, the third and final blow to the bank's profitability was delivered in the loan loss area. The provision for loan losses ballooned to $20.7 million from $11.1 million in 1974 as net chargeoffs jumped to $20.6 million, a painfully high 1.12% of average loans outstanding. The bank has a heavy commitment to real estate lending, and at year-end 1975 almost $250 million in direct real estate loans were outstanding, of which $123 million represented construction and development financing and less than $50 million consumer mortgages. In addition, the bank held $81 million in loans to real estate investment trusts (REITS). It is believed that a very significant proportion of the bank's 1975 chargeoffs stemmed from the real estate area, with perhaps $4 million coming from REITS alone. In addition, net chargeoffs of personal loans totaled more than $3.2 million, 1.98% of average outstandings, a relatively high figure for a bank's presumably relatively low risk consumer loan portfolio. Such a high net loss figure is usually more characteristic of a finance company operation, and in fact, C.I.T.'s net personal loan loss percentage in its finance operations was only 1.99% last year.

Reflecting the above influences, pretax income for the bank plummeted to $10.4 million from $32.6 million in 1974. Since $19.1 million in tax-free state and municipal bond income was included in this figure, the bank was unprofitable on a "financial statement" income tax basis. However, NBNA is included in C.I.T.'s consolidated tax return, so that after allocated tax recoveries of $3.7 million, the bank's net income totaled $14.1 million.

Net Loss in Property and Casualty Operations Offsets Good Life and Health Performance

Insurance Division results in 1975 can only be described as mixed. As indicated by the table below, a moderate 8% gain in earnings of the life and health company was outweighed by a dismal performance by the much smaller property and casualty company, so that total divisional net income fell 12%.

Insurance Division Net Income (Loss)
(In thousands)

	1974	1975
Life and Health	$13,106	$14,119
Property and Casualty	2,131	(748)
Total	$15,237	$13,371

The North American Company for Life and Health Insurance benefited from increasing penetration in group and individual life (term) and health coverages. Premiums written on these lines rose 18% to $52.8 million. However, trends in credit insurance writings were poor, reflecting the weak demand for consumer loans in C.I.T.'s loan offices. Premiums derived from C.I.T. loan customers fell 21% to $13.8 million. Taken together, total premium writings for the company climbed 7%.

Profitability benefited from increases in health insurance rates and a decline in mortality, as well as some favorable year-end tax adjustments. Net underwriting earnings jumped 33% to $9.2 million. However, net investment income fell 21% to $4.9 million as lower interest rates reduced yields on the company's heavily short-maturity-oriented, fixed-income investment portfolio. Also, the average portfolio was smaller, reflecting a hefty upstream dividend of

nearly $18 million taken out of the company by C.I.T. at the end of 1974. Thus, net life and health profits grew a more modest 8% to $14.1 million.

Like virtually all other property and casualty insurers, the North American Company for Property and Casualty Insurance suffered a dismal year in 1975. Although premiums written climbed 9%, reflecting the company's increasing participation in pools and syndicates (participations represented 69% of writings in 1975) underwriting results turned markedly unfavorable. Skyrocketing inflation in claims settlement costs erased underwriting spreads for many of the company's reinsurance participations, as well as in the dwindling mobile home and automobile lines. Obviously, recalcitrant rate regulation also served to inflate losses in consumer coverages. Even after tax credits, the net underwriting loss ballooned to $2.7 million from a negligible $0.1 million in 1974. After moderately lower net investment income of $2.0 million, versus $2.3 million in 1974, the property and casualty company recorded a net loss of $748,000, compared with 1974's profit of $2.1 million.

Manufacturing and Merchandising Earnings Rise Significantly

Chiefly because of an exceptional profit gain at Picker, Manufacturing and Merchandising (M&M) earnings increased 25% to $15.0 million from $12.1 million in 1974. Picker is enjoying outstanding demand for its lines of x-ray, nuclear, and ultrasound diagnostic imaging equipment. Gibson Greeting Cards, Inc. also posted higher earnings, as Christmas orders for both greeting cards and wrapping paper were especially robust. Both sales and earnings of All-Steel Inc., the office furniture manufacturer, declined in the face of the poor domestic economy and a seven-week strike at the company's Aurora, Illinois plant. Despite the weak trends in commercial and residential construction, Raco Inc. (the nation's leading manufacturer of electric outlet boxes and fittings) held both sales and earnings roughly level. Although no breakdown is provided by the company, it is this analyst's estimate that total M&M earnings in 1975 were divided roughly as follows: Picker – 55%, All-Steel – 20%, Gibson – 15%, and Raco – 10%.

1976 First Quarter Results

Distorted by a substantial 20¢ a share net beneficial adjustment for translation of foreign currency in accord with the requirements of FASB #8, C.I.T.'s fully diluted earnings advanced sharply in the first quarter to $1.20 per share from a restated 96¢ a share in the comparable 1975 period. However, even on a pre-translation basis, operating profits rose in the quarter to $1.03 a share from 99¢ last year. Because of the significant effect that the new accounting rule exerts on reported results, C.I.T. has chosen to isolate the FASB #8 adjustment on one line in the income statements, and not meld it into the specific divisional profit and loss accounts.

Finance Earnings Surge

Operating figures were significantly enhanced by the Finance Division's healthy 31% profit gain in the quarter. Key to the Division's performance was the $99 million increase in gross loans outstanding from the 1975 year-end level. This absolute increment is believed to be the largest first-quarter gain in outstandings in C.I.T.'s history. Examining individual loan categories, growth was spearheaded by the excellent $82 million gain in factoring and

commercial financing obligations. C.I.T. is benefiting from a healthy 50% year-to-year advance in total factoring volume. Also contributing to loan expansion was a $19 million hike in industrial financing notes and an $11 million increase in personal loans.

Despite the strong receivable growth, Finance revenues climbed only 2% from the year-earlier level, reflecting the slack volume trends of the fourth quarter (when outstandings *fell* $18 million) and the significantly lower rate of charge on variable rate loans compared to the early-1975 quotes. However, the decline in interest rates more significantly reduced C.I.T.'s own money cost, and interest expense declined 9% in the quarter. C.I.T.'s average cost of short-term debt dropped to 6.07% from 7.58% in 1975's first quarter. Actually, the company's cost of domestically placed commercial paper fell even further to roughly 5.5%, but the total cost of short-term funds was inflated by the firm's substantial borrowings (averaging $234 million during the quarter) in Canada, where interest rates averaged approximately 400 basis points higher than in the U.S.

Aided by the efficiencies of the newly installed CITATION computer terminal system linking the personal loan offices, operating expenses climbed only 3%, and were actually slightly below the burdens of the second and third quarters of 1975.

Net chargeoffs in the quarter fell sharply, to $4.5 million compared with $7.3 million in 1975, so that the provision for loan losses declined 21% despite the expansion in loans outstanding. Reflecting this decline – and, even more importantly, the drop in interest expenses – pretax Finance income rose almost 31%. With an approximately unchanged 47.3% effective tax rate, Finance operating earnings surged 31% to $16.0 million from $12.2 million in the 1975 period.

Significantly, loan delinquency declined moderately in the quarter. The percentage of loans for which a payment was 60 days or more overdue fell to 3.12% from 3.43% a year ago and 3.35% at the end of 1975.

First Quarter Bank Earnings Aided by Reduction in Loan Loss Reserve

National Bank of North America's first period earnings began to recover from the nadir reached in the fourth quarter of 1975. Although profits of $2.8 million represented a 50% year-to-year decline, they were more than double the $1.3 million earnings level of the previous quarter. Nevertheless, because of the manner in which these profits were achieved, the first quarter's performance cannot be considered particularly meaningful or reflective of any significant upturn in profitability. Although net chargeoffs ballooned to $9.2 million (higher even than the fourth quarter burden of $8.5 million), partially reflecting the visit of the bank examiners during the first quarter, the company provided only $4.5 million through the income statement to replenish the loss reserve, thereby reducing the reserve to 0.98% of loans outstanding at March 31 from 1.18% of loans at the 1975 year-end. Management is confidently forecasting that this is only an "interim reduction" in the reserve and that full-year writeoffs will be "close to" the planned $18 million provision ($4.5 million per quarter); confirmation of that prediction must, obviously, await actual future results. Consequently, the predictive value of the bank's first quarter results, *taken alone*, appears modest.

Other than the key loan writeoff-provision disparity, an examination of the bank's first quarter performance reveals relatively little that is particularly noteworthy or would be unexpected for a bank of NBNA's type in the present environment. Loans outstanding fell a negligible $67 million in the quarter from year-end levels as trends in bank loan demand remained weak. Excess liquidity was applied toward a slight increase in municipal bond holdings and a fairly substantial increase in the short-term redeposit book with foreign banks. Net interest earnings (fully taxable) of $25.8 million fell 14% below the year earlier level, and were slightly below the fourth quarter total of $26.4 million as domestic margins narrowed modestly for the entire industry.

Somewhat disturbingly, the important service charges on deposit accounts category continued to erode (on a quarter-to-quarter basis) in the first period, totaling $2.251 million, 12.3% below the peak of $2.566 million achieved in the second quarter of 1975. It should be noted that some adjustments were made in personal account fees last summer, which partially explains this decline, but management does not deny that the bank has lost some accounts, although they suggest that some of these losses were unprofitable relationships terminated at the bank's request. The "other revenue" category again rose substantially, climbing 25%, led by a surge in trading account income to $0.5 million from $0.1 million in last year's first quarter.

Non-interest expenses were again relatively well controlled in the quarter. Compensation expense climbed only 6.1%, while the "other operating expense" amalgam rose 6.1%. Boosted by costs of the new 200,000 sq. ft. operations center in Huntington, L.I. and by the five new branches NBNA opened in 1975, occupancy costs jumped a more significant 16.5% in the period.

As expected, the bank was again unprofitable on a tax return basis, so that net income mainly consisted of over $2 million in allocated income tax recoveries (NBNA is included in C.I.T.'s consolidated tax return).

Insurance Earnings Remain Depressed

Insurance Division earnings plunged 23% in the first quarter to $2.6 million from $3.4 million last year, reflecting declines in both the life & health and property & casualty segments. Burdened by some narrowing of health underwriting spreads and by a surprising increase in mortality during January, life & health earnings fell 15% to $2.93 million from $3.47 million. Results were also depressed by a 9% decline in net investment income, reflecting the effect of lower interest rates on the company's heavily short-term, fixed income portfolio. The property & casualty net loss widened to $308,000 from a $78,000 deficit last year, although this performance does represent some improvement over the fourth-quarter loss. C.I.T. continues to pay a price for its unfortunate selection of reinsurance pools and syndicates.

Manufacturing and Merchandising Performance Continues Very Strong

Continuing their outstanding recent performance, Manufacturing and Merchandising earnings jumped 50% in the quarter on a 13% sales gain. Although operating margins were a shade below those of last year, pretax profit spreads widened on the strength of a 39% decline in interest expense, reflecting both lower borrowings and interest rates. The M&M companies

have reduced their borrowings significantly through tight control of accounts receivable and inventories. Consequently, although the effective tax rate climbed to 49.9% from 43.0% a year earlier, profits surged 50% to $2.3 million.

Chief contributor to the earnings gain was Picker Corporation, which continues to enjoy outstanding demand, particularly for its line of ultrasound equipment. Raco and Gibson also posted somewhat higher profits. All-Steel was the only one of the M&M companies to record lower net income.

Estimated Full Year Results

Finance Division

With loan volume now expanding nicely and loan writeoffs expected to trend downward, the key variable for the Finance Division this year (as it is in most years) will be the course of short-term interest rates. Clearly, the longer that commercial paper quotes maintain their current roughly 5% level, the better Finance earnings will be.

Total receivables might expand about $200-$225 million (+6% to +7%) from the year-end 1975 level, implying about a 5% gain in average net outstandings to $3,315 million. Strong gains in personal loans and industrial financing obligations will more than offset continuing declines in motor vehicle and wholesale obligations and a probable sluggish performance in the mobile home area. Unfortunately, although leasing business is available, C.I.T. lacks sufficient taxable income this year to take advantage of additional leasing tax benefits, so that leasing outstandings will probably decline slightly. Factoring and commercial financing receivables should increase noticeably as activity expands, although growth is not likely to duplicate the first quarter's outstanding performance. Factoring volume will be boosted by the inclusion of a full year's worth of business from two important new clients signed up by C.I.T.'s Meinhard-Commercial factoring subsidiary in 1975: General Housewares ($54 million in sales) and the ripest plum, giant Manhattan Industries ($236 million in sales).

Assuming higher interest rates later in the year and a good gain in the relatively high-yielding personal loan category, Finance gross income might reach 14.3% of average receivables, which would be equivalent to the 1975 figure.

In line with our interest rate view, interest expense might climb about 9% to $188 million as the average cost of short-term debt expands slightly to 7.0%. Consistent with our forecast is an assumption of a year-end prime rate of about 8%-8½%, with 30-day commercial paper rates (in the United States) of roughly 7.0%-7.5%. As was the case in the first quarter, the Finance Division's total short-term borrowing cost is expected to continue to be inflated by substantially higher borrowing costs in Canada.

Operating expense control will continue to be aided significantly by the efficiencies inherent in the recently completed CITATION on-line computer system in the U.S. consumer loan office network. Largely because of CITATION, total employment in the consumer loan offices has been reduced to roughly 3,400 now from 4,300 at the end of 1974. Further modest reductions in loan office personnel are expected this year. Operating costs might climb about 4%, but actually decline as a percentage of average receivables.

Given the noticeable improvement in delinquency and the sharp drop in chargeoffs during the first quarter, the provision for loan losses could decline 11% to roughly $28 million for the year. Implicit in this forecast is an estimate of full-year net chargeoffs at $25 million, or 0.75% of average net receivables, as opposed to comparable 1975 figures of $29.6 million and 0.94%.

With little change expected in the effective tax rate, net Finance operating earnings might climb about 8% to $58.0 million, as indicated in the table below.

Estimated Finance Division Results (a)
(In millions)

	Actual		Estimated	% Change	
	1974	1975	1976	'75-'74	'76-'75
Avg. prime rate	10.8%	7.9%	7.4%	–	–
Avg. cost – short term debt	10.0	6.8	7.0	–	–
Avg. net receivables	$3,003	$3,150	$3,315	+ 5%	+ 5%
Gross income	$443.2	$449.2	$475.0	+ 1	+ 6
Interest expense	213.9	172.7	188.0	–19	+ 9
Operating expenses	128.7	140.5	146.0	+ 9	+ 4
Provision for losses	27.4	31.3	28.0	+14	–11
Total expenses	$370.0	$344.5	$362.0	– 7	+ 5
Pretax income	73.2	104.7	113.0	+43	+ 8
Income taxes	33.8	50.8	55.0	+50	+ 8
Effective tax rate	46.2%	48.5%	48.7%	–	–
Net income	$ 39.4	$ 53.9	$ 58.0	+37	+ 8
As % of Avg. Net Receivables					
Gross income	14.8%	14.3%	14.3%		
Interest expense	7.1	5.5	5.7		
Operating expenses	4.3	4.5	4.4		
Provision for losses	0.9	1.0	0.8		
Pretax income	2.4	3.3	3.4		
Income taxes	1.1	1.6	1.7		
Net income	1.3	1.7	1.7		

(a) Operating earnings only. Excludes the effect of FASB #8.

Bank Earnings Outlook for 1976 Uncertain

National Bank of North American represents the key uncertainty in the profit outlook for C.I.T. this year. Achievement of any earnings recovery for the bank will depend, most importantly, upon a higher prime rate, as well as an increase in loan demand, since the provision for loan losses is expected to decline only modestly. Barring such developments, NBNA's earnings will surely decline once again, as reported first-quarter earnings would indicate. Also, the loan loss situation is very fluid, so that our forecast of a slightly lower loss provision is not made with any great conviction.

However, our estimate is based upon the assumption that both interest rates and loan demand will begin to recover relatively soon. Our forecast assumes about a 0% gain in earning assets from year-end 1975 to year-end 1976, implying only a negligible 1% increase in *average* earning assets. The bank's prime rate is expected to be in the range of 8.0%-8.5% by year-end, averaging about 7.4% for the year. Margins might respond quite quickly to the initial strengthening of loan volume, given the bank's currently ample liquidity, so that full-year net interest margins could reach the 4.40% of 1975, despite the lower average prime rate. Thus, net interest income might rise slightly.

Certainly, C.I.T.'s decision to provide only a $4.5 million loan loss accrual in the first quarter, even though actual net writeoffs amounted to $9.2 million, adds an element of concern in the loan loss area. This move significantly reduces the loan loss reserve to $16.4 million (0.98% of outstanding loans) as of March 31, 1976 from $21.1 million (1.18% of outstandings) at year-end 1975. Nevertheless, it should be noted that management states that this will be only an "interim reduction" in the loss reserve and that for the full year, *net chargeoffs will be "close to" the planned $18 million provision*, which is to be accrued at the rate of $4.5 million per quarter. Management is confident that writeoffs will drop sharply from the first quarter level. Thus, the outside observer is left to "take it on faith" that management's prediction will prove accurate.

Although the heavy writeoff burden of the first quarter (higher even than fourth quarter net chargeoffs of $8.5 million) might appear to make such a belief a risky exercise, this analyst is inclined to trust management's forecast. It is certainly true that in the past C.I.T. executives have generally proven themselves to be cautious and accurate forecasters. Thus, this analyst is not ready to quarrel with the prediction of a full year provision of $18 million and net chargeoffs very close to that number also.

Should chargeoffs be higher than the company anticipates, it seems highly likely that the provision would have to be raised also. It appears reasonable to expect that a bank with as poor a loan loss record as NBNA's and with such a heavy weighting of relatively high risk construction and development financing and consumer loans should maintain a loss reserve well in excess of 1.0% of loans outstanding. At the March 31 level of 0.98%, the loss reserve looks "thin" to this observer. It is somewhat encouraging, however, that NBNA's nonaccrual loans, after peaking at $200 million in June 1975, have trended downward to $175 million at year-end 1975 and to $160 million at March 31, 1976. A continued gradual decline is expected, particularly in the second half. Management is convinced that the C&D loan portfolio will reflect significant improvement later in the year.

Increases in both non-interest revenue and expense are likely to moderate somewhat under the respective influences of the still sluggish business volume trends and relatively tight cost controls. Consequently, pretax income might post some recovery, and after a reduced net tax credit, bank earnings might reach $15.0 million, a modest 6% above 1975's severely depressed figure.

A summarized outline of our estimate is presented below, along with actual 1974 and 1975 data.

National Bank of North America
Estimated 1976 Results
(In millions)

	Actual		Estimated	% Change	
	1974	1975	1976	'75-'74	'76-'75
Average prime rate	10.8%	7.9%	7.4%	–27%	– 6%
Average earning assets	$2,450	$2,496	$2,530	+ 2	+ 1
Net interest margin	4.91%	4.40%	4.40%	–10	–
Net interest income	$120.4	$109.9	$111.2	– 9%	+ 1%
Non-interest revenue	$ 16.3	$ 19.8	$ 21.8	+21%	+10%
Non-interest expenses	75.2	81.8	88.5	+ 9	+ 8
Loan loss provision	$ 11.1	$ 20.7	$ 18.0	+86%	–13%
Pretax income (a)	$ 32.6	$ 10.4	$ 12.0	–68%	+15%
Income taxes (recoveries)	7.6	(3.7)	(3.0)	–	–
Net income (b)	$ 25.0	$ 14.1	$ 15.0	–44%	+ 6%

(a) Net of taxable equivalent adjustment of $17.8 million in 1974, $16.8 million in 1975, and $14.5 million (estimated) in 1976.

(b) No securities gains or losses were recorded in 1974 or 1975 and none are expected in 1976.

Another Poor Year Expected for Property and Casualty Operations

Property and casualty insurance results will probably be quite disappointing again in 1976. Unfortunately, the company is still committed to participate in several underwriting syndicates that are likely to show very poor results again this year. Another small net loss, perhaps equivalent to last year's $0.7 million deficit, appears to be a reasonable expectation at this time. The company is pulling out of its pool and syndicate memberships as quickly as possible, so that exposure in the property and casualty area is being significantly reduced. This process should be largely completed by year-end, although the business has a long enough "tail" that some minor losses on these lines could continue into 1978, at the outside.

Modestly Higher Life and Health Earnings Likely

The outlook for life and health insurance operations appears to be positive again this year. Key to this assessment is the assumption that sales of the highly profitable credit life and health coverages will increase as consumer loan volume expands.

Writings of ordinary life insurance coverages should also continue to expand as the agency force grows. Given recent slackening trends in inflation and some modest rate relief, health underwriting results might also improve somewhat, despite the first quarter's experience. Assuming higher interest rates later in the year, investment income is sure to increase, reflecting the disproportionate commitment to short-term debt securities in the portfolio, and the fact that C.I.T. took no dividends out of the life company last year. Overall, net income of life and health insurance operations might rise 4% to $14.6 million.

EXHIBIT J, ANNEXED TO COMPLAINT

Stronger Economy will Boost Manufacturing and Merchandising Profits

In the stronger economy of 1976, Manufacturing and Merchandising earnings should again climb substantially, with All-Steel and Raco, the two highly cyclical subsidiaries, showing especially healthy gains, although some pronounced price competition is now evident in the office furniture market. Nevertheless, All-Steel's results will be enhanced by the absence of the seven-week strike at the Aurora, Illinois plant, that cut deeply into 1975 earnings. Gibson might also show higher profits in response to the recovery in consumer confidence and spending, although the recent 3¢ rise in first-class postage rates will certainly do nothing to inflate Christmas card volume. Since Gibson's full-year results are largely determined by the Christmas selling season, the key variable is year-end economic conditions. Picker, the recent-year star performer of the M&M group, should show further gains this year, although the rate of growth will certainly slacken from the strong pace of the past two years. Progress will be hindered by increased research and development spending on computerized axial tomographic (CAT) scanning techniques, the new technology that is revolutionizing X-ray diagnostics (see the "Longer Term Outlook" section of this report).

Taken together, Manufacturing and Merchandising earnings should climb at least 11% to $16.7 million.

Consolidated Results

Estimated divisional net income figures are summarized below, along with actual 1974 and 1975 results. Noteworthy are the significant increases in the net interest costs allocated to the carrying of the non-consolidated M&M and banking subsidiaries. These hikes reflect the increasing average rate paid on C.I.T.'s total long-term debt, including in 1976 the recent unfortunate maturing of $100 million in 4% subordinated notes, which were rolled over as part of the company's recent straight debenture issue at 8.13%.

Consolidated Net Income (Loss)
(In millions)

	Actual		Estimated	Change	
	1974	1975	1976	'75-'74	'76-'75
Finance	$39.4	$53.9	$ 58.0	+37%	+ 8%
Banking	25.0	14.1	15.0	-44	+ 6
Life & health insurance	13.1	14.1	14.6	+ 8	+ 4
Property & casualty insurance	2.1	(0.7)	(0.7)	–	–
Manufacturing & merchandising	12.1	15.0	16.7	+24	+11
Operating income	$91.7	$96.4	$103.6	+ 5	+ 7
Less: Interest expense applicable to non-consolidated subsidiaries	5.5	6.0	6.7	+ 9	+12
Net operating income	$86.2	$90.4	$ 96.9	+ 5	+ 7
Operating EPS – primary	$4.12	$4.32	$4.60	+ 5	+ 6
Operating EPS – fully diluted	$4.02	$4.21	$4.50	+ 5	+ 7
FASB #8 adjustment	N.A.	($ 2.8)	$ 2.1	–	–
Net EPS – primary	N.A.	$4.18	$4.70	–	+12
Net EPS – fully diluted	N.A.	$4.08	$4.60	–	+13

N.A. Not available

Fully diluted operating earnings per share may climb about 7% to $4.50 from $4.21 in 1975. Net earnings however, should benefit from a substantial positive adjustment on currency translation, in accord with the dictates of FASB #8. This credit stems almost entirely from the significant strengthening of the Canadian dollar. C.I.T.'s effective net asset position in Canada exceeds $200 million, virtually all of which is related to the Finance division. Actually, our "FASB estimate" of a 10¢ a share full-year credit assumes that the Canadian dollar will weaken from present levels as the year wears on, since the company enjoyed a beneficial adjustment on currency of 17¢ a share in the first quarter alone. Obviously, it is extremely difficult to project currency exchange rates, so that the currency translation forecast is made with a fairly low level of confidence. What is clear is that the new accounting rule will probably serve to distort quarterly earnings comparisons, and to noticeably increase their volatility. Although the accounting pronouncement requires that reported per share earnings include the currency adjustment, C.I.T. plans to break it out on a separate line in the income statement, assuming their auditors continue to allow this treatment. Needless to say, investors would appear to be well advised to focus on "operating earnings" as the best measure of C.I.T.'s true fundamental performance.

In that regard, it should be underscored that the key variable affecting C.I.T.'s fundamental performance is the path of short-term interest rates. Although National Bank of North America benefits markedly from *rising* interest rates, this influence is substantially outweighed by the negative effect of rising money costs on the much larger Finance Division with its predominantly fixed rate loan portfolio and more than $1.3 billion in commercial paper borrowings. Thus, it is unquestionably true that the C.I.T.'s earnings benefit most from relatively low or declining short-term interest rates. It is our estimate that, all other things being equal, every 10 basis point change in the annual average short-term borrowing cost affects per share earnings by about 2¢. Thus, should money costs not rise as rapidly this year as we have predicted, C.I.T.'s operating earnings could come in somewhat above our forecast.

It is this analyst's belief that, assuming continuing improvement at the bank, C.I.T. management will raise the annual cash dividend late in 1976 by a modest amount, perhaps 8¢-12¢ per share.

Possible 1977 Results

Although the 1977 outlook is by no means clear, it would appear at this time that C.I.T. should record at least modestly higher earnings again next year. On the assumptions of a slowing domestic economy and significantly higher short-term interest rates, Finance profits would be likely to decline moderately from the indicated 1976 peak. However, NBNA's earnings should benefit from the expected improvement in bank loan demand late this year and into 1977, as well as from the key influence of a higher prime rate. Estimating a loan loss provision about equal to 1976's planned $18 million accrual as net chargeoffs decline somewhat, bank earnings might recover significantly, perhaps to roughly $20 million. However, profits are not likely to approach peak 1974 earnings of $25 million. Insurance results should be enhanced significantly by the elimination of the property and casualty company's net loss as the burdensome reinsurance participations expire late this year. Most likely the P&C company will either return to modest profitability or be closed down altogether, and the capital allocated to it will be re-invested by C.I.T. in the Finance business, thereby boosting consolidated earnings. Barring a severe downturn in the U.S. economy, Manufacturing and Merchandising earnings might not be significantly changed, as the anticipated cyclical recovery at All-Steel and Raco probably carry over into early 1977, while Picker is likely to continue its fairly strong showing.

On balance, assuming an average prime rate of about 8¾%-9%, C.I.T.'s fully diluted operating earnings per share might range from $4.60 to $4.75, compared with the $4.50 estimated for 1976. Obviously, our estimate is for operating earnings only, since the currency adjustment is unforecastable. Should the economy remain relatively strong and/or interest rates rise less rapidly than we anticipate, earnings could significantly exceed the indicated range.

Longer Term Outlook

In assessing the longer term outlook for C.I.T. Financial Corporation, it is clear that the Business and Consumer Financing Division and the National Bank of North America must be evaluated in tandem, as an earnings matrix. The two units' operating trends are hedged, with opposite exposures to changes in short-term interest rates. The Finance Division, with its massive commercial paper borrowings and largely fixed rate receivable portfolio, suffers during periods of increasing money costs. Conversely, the strongly capitalized and relatively low-leveraged Bank, which adjusts portfolio yields to prime rate changes, benefits in such an environment. Correspondingly, during periods of *declining* interest rates the divisions' earnings scenarios reverse. Thus, the Finance-Bank combination serves to fill in and partially smooth the profit peaks and valleys that would otherwise result from the operations of either unit existing alone. However, it should be noted that the Finance Division, with a loan portfolio roughly twice the size of the bank's, is the dominant force in determining the earnings stream. Thus, for the foreseeable future at least, the interest sensitivity of C.I.T. Financial Corporation will remain very markedly on the liability side.

Finance Division

It is this analyst's view that demand for C.I.T.'s commercial finance services will continue strong in future years, although the division will probably become increasingly sensitive to cyclical fluctuations. The H. C. Wainwright economic scenario envisions a more volatile U.S. (and worldwide) economic environment in the years ahead, in which interest rates and inflation will trend toward higher average levels. Both business recessions and expansions may be relatively pronounced by historical standards, as well as being fairly short-lived. In such a climate, although real trendline growth may be slightly slower, capital is likely to be in rather short supply. Industrial returns on investment and cash flow will probably prove insufficient to finance heavy working capital needs in an inflationary environment, much less to meet the already growing backlog of deferred capital expenditures. Essentially, in our view, anyone with money to lend will have no trouble finding clamoring borrowers. In such a "capital-short" world, demand for commercial finance type services should be particularly pronounced, and banks will probably focus their unsecured lending efforts on only the strongest, best capitalized borrowers.

Implicit in this outlook is the belief that banks are not about to run roughshod over the commercial finance industry. Traditional, unsecured bank lending, with its stress on seasonal, "self-liquidating" working capital loans is a quite different discipline from secured commercial finance lending. Unlike bank credit extension, which generally requires an intensive annual review of the borrower's condition followed by a relatively casual monitoring thereafter, commercial finance work requires constant, vigilant surveillance of collateral. Therefore, banks' lending officers cannot extend commercial finance services without extensive retraining. Given the high level of expertise necessary for profitable commercial finance lending, as well as the key factor of most banks' already limited capital resources, it seems unlikely that the banking industry will be taking significant market share from such giant finance companies as C.I.T. in the future.

C.I.T.'s consumer outstandings should also expand, although at a slower pace than in the past decade, when growth was inflated by the rapid build-up in the mobile home business as C.I.T. entered that burgeoning market.

Even so, mobile home receivables should continue to grow. The skyrocketing cost of land and construction has put conventional single-family housing beyond the reach of many families. Consequently, the average income of mobile home buyers continues to increase as more Americans are forced to settle for this form of home ownership. Contrary to the irrational fears expressed by some investors because of the unrelated losses of some other companies in this field, C.I.T.'s disciplined approach to the business has kept its losses quite low. In fact, as discussed in the "Loan Losses" section of this report, 1975's still quite modest mobile home losses of 0.40% of average outstandings represented the company's worst experience in this area in its history. Over the last five years, net losses on mobile home outstandings have averaged only 0.23%.

Although good growth is expected to be maintained in the total personal loan market, C.I.T.'s activities (and all the finance companies' efforts, for that matter) will be under some pressure from credit unions, savings and loans, and, perhaps to some degree, commercial banks. Clearly, the thrift institutions, and to an even greater degree, the credit unions, have taken substantial personal loan market share from the finance industry, with their combined portion rising from roughly 18% in 1965 to about 29% today. Over the same period, the finance industry share fell from 50% to 37%, while the commercial bank proportion has expanded only marginally to 34% from 32%. Aided by the key advantage of their tax-free status, and by the apparently benevolent regulatory climate in which they operate, credit unions can probably be expected to continue to slowly enlarge their market share. The thrift institutions are also likely to gain ground, given current discussions in Congress about sharply increasing these institutions' consumer banking options.

This analyst is less confident that commercial banks, on the other hand, will substantially increase their market penetration. Given our estimates of financing needs of commercial and industrial customers, and the not unlimited capital resources of most banks, it is this analyst's contention that the industry will be generally content to satisfy itself with its traditional, fairly low-risk, "cream" segment of the consumer market. Although an occasional bank, such as Citicorp, has shown a clear understanding of this business and a willingness to attack it with a vengeance, it would appear that most bankers are still a little leery of consumer lending, especially the kind of high-risk, frequent roll-over lending that the finance concerns specialize in.

The key point to be made here is that continued strong growth in consumer credit is expected for at least the next decade. The demographics are particularly favorable; the key 25-34-year-old age group (the heaviest borrowers and the finance companies' prime market) will show the largest population gain – increasing 22% by 1980. Growth in installment lending will also be stimulated by continuing inflation, rising personal incomes, and liberalized unemployment and related social insurance benefit programs, which increase consumer willigness to take on debt. Given these influences, the total consumer loan market might grow about 8%-10% annually over the next decade, although year-to-year gains may be erratic.

Thus, although the finance companies' market share may be declining, it would appear that the industry will still be taking a quite satisfying slice from a significantly expanding pie.

Furthermore, it is this analyst's strong belief that the process of contraction in the industry will accelerate in future years. Only the very strongest companies – such as C.I.T., Household, Beneficial, and a few others – with the very strongest national franchises, ability to borrow funds most cheaply, and maximum operating efficiencies will be able to prosper in the face of intensified competition. Accordingly, C.I.T. should continue to gain market share within the finance industry, as it has done for over a decade.

Some uncertainty is created for C.I.T. and virtually all consumer lenders by the emergence of electronics funds transfer systems (EFTS). The possibility exists that at some time in the not too distant future consumer credit will become instantly available to individuals through computer terminals in supermarkets and other retail stores, perhaps obviating the need to walk down the street to a finance company or bank to obtain credit. However, it would appear likely that finance companies would also have access to any national EFTS networks. Apparently, transition to an EFTS mode would not be particularly difficult for C.I.T., given its CITATION computer system, which is essentially a functioning funds transfer network. Thus, if we assume that all lenders will have access to the EFTS delivery system, the question again centers on whether competing lenders will be willing to take on "finance company type" risks. Although the marketing economies of EFTS might induce banks to become somewhat more venturesome in consumer credit, this analyst does not believe that EFTS will substantially alter the scenario traced above. Nevertheless, the uncertainty here is great, so that upcoming developments in the EFTS area must be monitored closely.

One important advantage for C.I.T. as a *diversified* finance company is its flexibility. With its well established marketing channels to the most significant sources of lending business in the nation, the company has the option of shifting funds to whichever markets are most attractive at any given time. As is demonstrated by the company's dramatic withdrawal from the formerly huge auto financing business (which C.I.T. essentially pioneered), management has always been open-minded and pragmatic about pursuing only the most attractive avenues of growth.

On the assumption of a 9% annual rate of growth in total credit outstanding, reflecting real GNP growth of 3% per year and a 6% inflation rate, C.I.T.'s total receivables growth rate is projected at 7%, which assumes that the company will lose only a modest amount of market share.

Finance revenue expansion in future years should slightly exceed loan volume gains. Although the average rate of charge on the personal loan portfolio is likely to decrease as additional, larger lower-yielding notes (but more profitable because of lower operating expenses per dollar loaned) are taken, mobile home yields will be gradually upgraded. More significantly, the expected secular trend to higher short-term interest rates and an increasingly variable, rather than fixed-rate, arrangement on business loans should raise the total portfolio's gross yield.

Operating expense growth should be reduced by the recently completed CITATION on-line computer terminal system in the consumer loan offices. The bookkeeping and control efficiencies inherent in the system should allow continued modest reductions in the total consumer loan office staff over the next few years. Plans are also in the works to extend the system to the Canadian consumer outlets, and eventually, to the 30 industrial and commercial finance offices around the country, which should reduce manpower needs in those branches as well.

In the anticipated future economic environment, net loan chargeoffs and loss provisions are likely to trend somewhat higher for all lenders. In addition, intensifying competition may force C.I.T.'s consumer lending activities a little farther out on the risk curve. However, in view of the extensive collateralization of most commercial finance loans, egregious increases in loan losses are not expected. and the loss provision is likely to remain a relatively modest influence on earnings in most years, overshadowed by the effect of money costs.

The key determinant of profitability in C.I.T.'s finance business will remain the level of short-term interest rates. With over $1.3 billion in commercial paper outstanding but less than 20% of the loan portfolio on a variable, rather than fixed, rate basis, C.I.T.'s Finance division has a prodigious exposure to short-term money costs. Thus, changes in the company's average cost of commercial paper borrowings are the most significant influence on incremental profitability. As discussed earlier, the H. C. Wainwright view is that short-term interest rates will fluctuate around a higher mean in the future than they have in past years. In addition, the average cost of long-term borrowings will necessarily rise gradually as older bond issues mature and are rolled over at the higher long-term rates now prevalent. Clearly, C.I.T.'s 6.13% (in 1975) average cost of long-term debt can only go in one direction, suggesting that the firm's lending spreads will trend slightly lower in the future, despite the expected gradual improvement in the mean portfolio yield. Implicit in our analysis is the assumption that C.I.T. will not be able to fully offset the higher cost of funds by "pricing up," chiefly because of regulatory pressure on personal loan yields. Furthermore, while such rate structures as "prime plus 4%," or even "prime plus 7%," are perfectly normal for some financing arrangements when the prime is at reasonable levels, they probably become more difficult to obtain as interest rates rise to the double digit area. Essentially, the point is that rates are probably somewhat sticky on the upside.

Overall, C.I.T.'s Finance Division profitability will be buffeted, both on the downside and upside, by the expected violent swings in interest costs. The pattern of Finance earnings, taken alone, is likely to continue to be fairly erratic. Nevertheless, the expanding receivable portfolio and expected tight control of operating expenses suggest that Finance earnings might post moderate growth averaging about 5% to 6% annually over the longer term.

National Bank of North America

In future years, National Bank of North America's earnings should continue to act as a substantial hedge to the swings in Finance results. Key to this assessment is the H. C. Wainwright economic view, which, as discussed previously, envisions a shortage of capital together with relatively high interest rates, creating a "seller's market" for funds and. probably, a relatively firm pricing structure in the banking industry generally. As a well capitalized, "asset weighted" bank not heavily dependent on the money market for funding, NBNA should be a decided beneficiary of such an operating environment. It is this analyst's expectation that C.I.T. will not attempt to *significantly* leverage the bank's conservative capitalization, and will maintain an imbalanced interest sensitivity in order to smooth the consolidated earnings pattern of the whole corporation. However, management does express a willigness to leverage the bank's capitalization to some degree, particularly if it proves possible to partially reduce the liability sensitivity of the Finance Division by greater proportionate sales of long-term debt. But it is our view that neither of these alterations is likely to be substantial. and, moreover, that the Finance-Bank hedge will continue to operate in the future, if only to a slightly lesser degree.

Nevertheless, it is clear that NBNA is a maturing institution that will not duplicate its remarkable past earnings growth record, even in comparison with the 1975-1976 trough.

The relatively "easy" benefits of consolidating and upgrading Meadow Brook's (the original banking acquisition) Long Island position and melding in the Bank of North America, Trade Bank, and the other smaller acquisitions have now been largely realized. Substantial workout problems remain for the bank in both the REIT and direct real estate lending areas, so that a relatively high (but tolerable) level of loan chargeoffs will probably be sustained over the next few years. Moreover, competition for business in NBNA's key Long Island retail and commercial markets will likely eventually be intensified by the respective European-American and Chemical Bank takeovers of the mismanaged Franklin National and Security National Bank. By the same token, further acquisitions for NBNA continue to be a possibility, particularly in the Mid-Hudson Valley and Upstate New York.

Naturally, some uncertainty is created for nearly all banks by the eventual changes that EFTS technology will bring. In that regard, NBNA appears to be taking the course of action elected by most banks – to wait for further developments before making any substantial investments or commitments in EFTS techniques. It should be noted that, although the bank operates an extensive network of over 140 offices, it has not built an expensive collection of ornate brick and mortar palaces; rather, heavy use has been made of simple store-front and shopping center installations. Consequently, the bank's flexibility in adjusting to the presumed emergence of EFTS is probably greater than might initially be apparent. However, this analyst does not pretend to know how the whole EFTS question will wash out, or how the industry will adjust to the eventual expected payment of interest on demand deposits, increased commercial banking powers by thrift institutions, and a whole host of other regulatory questions. Thus, the "visibility" of future earnings performance by the bank may not be as great as it was a few years ago, although the maintenance of a healthy, profitable commercial banking system would seem to be prerequisite to a sound national economy, a goal that even the industry's most strident critics would also seemingly espouse.

Generally speaking, it seems a reasonable expectation that NBNA will continue to provide an important offset to Finance Division results when interest rates are rising. Although moderate trendline growth in profits is anticipated beyond the expected significant recovery year in 1977, progress is not likely to be steady, and earnings will rise, and in some years, fall, largely in response to swings in the prime rate.

Life and Health Insurance

The outlook for C.I.T.'s life and health insurance company appears relatively favorable. The life insurance segment, the more predictable component, should benefit from strong increases in the prime life insurance buying 25-44-year-old age group over the next decade. Individuals in this category typically carry a high proportion of family responsibilities and debt, combined with a relatively low net worth and corresponding dependence upon earned income. Moreover, increasing inflation will probably continue to compound the dollar amount of coverage required to protect standards of living. Thus, the theoretical aggregate demand for life insurance should rise strongly. C.I.T.'s penetration of this expanding market should be aided by the company's concentration on term (rather than ordinary life) coverages, the much faster growing form of life insurance protection. Apparently, increasingly better-educated and cost-conscious consumers are opting to a greater degree for the much cheaper "pure protection" offered by term contracts rather than the somewhat dubious "investment value" of much more expensive ordinary life policies.

The prospects for health insurance operations are somewhat uncertain. With a modest volume of business in the highly competitive group health insurance area, the company has some exposure to the substantial swings that occur in health underwriting. However, the company has done a good job of preserving health profitability, and although underwriting margins have narrowed somewhat in recent years, health activities have remained well in the black. One exogenous factor that could affect health operations at some point in the future is the possible enactment of some form of National Health Insurance (NHI). However, the chance of such an occurrence in the near future now appears significantly less than it did a few years ago, and even if NHI were enacted, practical considerations suggest strongly that the private insurers will retain the key role in any program.

Life and health profitability should benefit from a recovery of volume in the relatively stable, high-profit, credit life and health area as C.I.T. consumer loan volume expands. With its premium rates well below the highest rates charged by some finance companies, C.I.T.'s activities should not be seriously affected by some continuing rumblings among state insurance regulators to lower allowed rates of charge. Thus, the still highly lucrative credit insurance segment should be making an increasing contribution to life and health company earnings in the years ahead.

Aided by increased writings of straight term insurance and credit coverages, total life and health premium volume should noticeably exceed the disappointing 5% average annual growth rate of the past eight years. Profits should at least keep pace, perhaps rising about 7%-8% annually, although year-to-year comparisons are not likely to be steady.

Property and Casualty Insurance

The longer term outlook for C.I.T.'s property and casualty insurance company is highly uncertain at this time, with even the continued existence of the enterprise beyond 1976 open to question. The P&C company (which insured cars financed by C.I.T.) has never really established a new identity for itself since C.I.T. turned away from the auto loan market in the late 1960's. The earnings and assets of the company have been shrinking ever since, as the previously massive auto premium income has run off much faster than mobile home (also C.I.T.-finance related) coverages have grown. In recent years, the company had attempted to put capital to work as a reinsurer, participating in a motley collection of pools and syndicates. However, as indicated by actual 1975 (and estimated 1976) results, this course of action has proven to be highly unsatisfactory. C.I.T. executives admit that they have not yet decided what to do with this small company. In this analyst's opinion, termination of property and casualty operations would be a welcome move, freeing up (after some lag) the roughly $20 million in capital that is trapped in this deficit-ridden operation.

Manufacturing and Merchandising

C.I.T.'s Manufacturing and Merchandising group can probably record moderate earnings gains in most future years, although growth is likely to slow markedly from the 20% average annual rate of expansion in the 1971-1975 period. Gains in those years were inflated by Gibson's and especially Picker's recoveries from very depressed levels as serious operating problems were corrected. Although the group is still earning an inferior return on investment, C.I.T. management is committed to keeping these companies and developing their profitability.

Picker should benefit from a continuing high level of demand for its medical products, since health care expenditures in the U.S. are likely to increase significantly. Apparently, social and

political developments are signaling a trend toward making comprehensive medical care available to a much larger percentage of the population through various insurance and/or welfare programs. Demand for Picker's line of X-ray, nuclear, and ultrasound diagnostic imaging equipment should be inflated by this ancitipated greater penetration of first class medical services.

Some uncertainty is created by the new technology that may revolutionize diagnostic activities, computerized axial tomography (CAT). CAT scanning provides a doctor with views of body cross-sections or "slices," reconstructed by a computer from hundreds of individual X-ray projections. Without damage or discomfort to the patient, it provides a clear view of tissues and organs so inaccessible that exploratory surgery might otherwise have been necessary to make a diagnosis.

With an overwhelmingly enthusiastic response from the medical profession, CAT scanning threatens to eventually obsolete most traditional X-ray techniques. Consequently, all the traditional X-ray suppliers are scrambling to quickly develop their own CAT scanners and catch up with England's EMI, Ltd., which pioneered in this technology and has a big head start. Although Picker will be late in entering the market, with deliveries of its whole-body scanner not scheduled until early 1977, the device will reportedly be particularly advanced technologically, allowing the operator to vary radiation dosages across a broad spectrum and with one of the faster scan times yet available. Given the anticipated arrival of this device, and Picker's well established reputation and connections in the medical profession, this analyst remains fairly sanguine about the company's prospects, despite the possible technological upheaval. A point in Picker's favor is its extensive service operation, since hospitals are concerned that parts and repairmen will be available quickly to minimize "downtime" of these very expensive machines (purchase price is roughly $500,000). Nevertheless, it is clear that profit growth for Picker will slow from the dramatic gains of the past few years. The initial, "easy" gains from turning around this formerly troubled company have now largely been attained, so that earnings growth will probably slacken in future years.

In past years the two relatively problem-free companies in the M&M group, All-Steel and Raco, both maintained strong positions in their respective industries. Both companies should continue to be significant, but highly cyclical, contributors to net income. Results will be buffeted by trends in the national economy generally, and in commercial and residential construction in particular.

Apparently trailing far behind Hallmark and American Greetings in the highly competitive, yet highly concentrated greeting card business, Gibson is reportedly earning a particularly poor return on C.I.T.'s investment despite the good earnings of its Cleo Wrap subsidiary. Given industry projections of 8%-10% average annual growth for cards and related paper products over the next few years, Gibson's earnings should continue to post some growth, although this analyst cannot make a case for any pronounced expansion of the unit's profitability.

Consolidated Results

Taken together, C.I.T.'s per share earnings might advance at about a 6% average annual pace in future years, as the well-conceived Finance-Bank earnings matrix continues to partially offset the effect of fluctuations in short-term interest rates on the company's cost of funds. Progress should be importantly aided by improvement in the insurance area, as property and casualty operations either return to profitability or are terminated, with re-investment of the capital

so committed in the higher yielding Finance business. Implicit in our 6% earnings growth figure is the assumption of a dividend payout ratio of roughly 50% and a sustainable return on equity of about 12%, somewhat above the 1975 and 1974 experience. Improvement in the Bank's profitability and in P&C insurance operations should prove more than sufficient to lift the corporate return on equity back into the 12.0% vicinity, although perhaps not to the peak 13.0% level of 1964 (when commercial paper rates averaged a modest 3.9%).

Operating Record

Compared to other companies in the consumer and commercial finance industries, C.I.T. has recorded a particularly consistent, although relatively modest earnings growth record. Per share profits have increased at about a 5% compound annual rate over both the past 12- and 25-year periods. Earnings increases were recorded for a remarkable 22 years without interruption from 1952 through 1973, before faltering slightly in 1974 as unprecedented double-digit short-term borrowing rates choked Finance profitability. Key operating and investment statistics for the company over the past 12 years are summarized below.

(See table on following page)

Operating Record
(000 omitted)

Year	Average ST Borrowing Cost	Net Income				Total Net Income (a)	Retun On Equity	Per Common Shr.		Approx. Price Range	P-E Ratio Range	Mean P-E To S&P 425 Avg.
		Finance	Banking	Insurance	Mfg. & Merch.			Earns. (b)	Div.			
1975	6.8%	$53,944	$14,137	$13,371	$15,020	$90,380	11.5%	$4.21	$2.20	38-26	9- 6	0.69
1974	10.0	39,383	25,014	15,237	12,060	86,216	11.4	4.02	2.20	44-23	11- 6	0.90
1973	8.0	47,138	21,557	14,817	10,848	89,126	12.5	4.15	2.15	49-35	12- 8	0.75
1972	4.7	50,024	18,072	13,072	10,022	86,072	12.9	4.02	2.00	54-44	13-11	0.67
1971	5.1	45,147	20,198	11,529	7,382	78,651	12.6	3.68	1.90	51-40	14-11	0.69
1970	7.8	37,027	19,791	11,400	3,165	65,661	11.5	3.20	1.80	45-32	14-10	0.73
1969	7.6	35,198	15,672	11,611	5,039	62,649	12.0	3.12	1.80	48-31	15-10	0.71
1968	6.0	32,504	11,550	13,190	8,003	60,644	11.7	3.02	1.75	60-32	20-11	0.90
1967	5.2	33,823	8,481	15,398	7,486	60,472	12.1	2.94	1.60	36-28	12-10	0.65
1966	5.5	27,624	6,350	15,143	10,724	55,282	12.1	2.76	1.60	32-24	12- 9	0.69
1965	4.3	27,534	3,890	15,060	6,926	50,730	12.3	2.64	1.60	37-29	14-11	0.74
1964	3.9	29,250	–	14,632	5,957	49,195	13.0	2.56	1.60	41-33	16-13	0.82
Percent Change from Year Earlier												
1975	–32%	+37%	–43%	–12%	+ 25%	+ 5%		+ 5%	–			
1974	+25	–16	+16	+ 3	+ 11	– 3		– 3	+2%			
1973	+70	– 6	+19	+13	+ 8	+ 4		+ 3	+8			
1972	– 8	+11	–11	+13	+ 36	+ 9		+ 9	+5			
1971	–35	+22	+ 2	+ 1	+133	+20		+15	+6			
1970	+ 3	+ 5	+26	– 2	– 37	+ 5		+ 3	–			
1969	+27	+ 8	+36	–12	– 37	+ 3		+ 3	+3			
1968	+15	– 4	+36	–14	+ 7	0		+ 3	+9			
1967	– 5	+22	+34	+ 2	– 30	+ 9		+ 7	–			
1966	+25	0	+63	+ 1	+ 55	+ 9		+ 5	–			
1965	+10	– 6	–	+ 3	+ 16	+ 3		+ 3	–			

(a) Reflects total net income of the four divisions less "interest expense applicable to cash investments in subsidiaries not consolidated."

(b) Fully diluted, as originally reported.

As indicated by the table, earnings of the Finance Division, with its pronounced interest sensitivity on the liability side, perform best when short-term interest rates are relatively low or declining, and are reduced when borrowing costs increase. Conversely, the strongly asset-weighted National Bank of North America *benefits* from rising rates. Reacting to swings in money costs, the strong performance of either the Finance Division or the Bank has outweighed the weaker comparison of the other contra-balanced unit in most years, so that the sum total of Finance and Banking earnings has increased in every year except 1974. Although Finance profits increased at a rate of less than 6% a year compounded annually over the period, the total of Finance and Bank earnings climbed an average of almost 8% per year.

It is apparent that C.I.T.'s withdrawal from the automobile financing business aided Finance profitability. As late as the mid-1960's C.I.T. was the world's largest independent source of automobile credit, with direct consumer and wholesale (floorplanning) auto loans in excess of $1.2 billion, or roughly 50% of total receivables. However, C.I.T. found that the low rates of charge and relatively high operating expenses attached to this business had made it unattractive, so that the company essentially turned its back on the market and "gave it" to the captive finance subsidiaries of the automakers and to the banks. Total direct motor vehicle receivables and wholesale financing obligations fell from $1.2 billion at the end of 1968 to about $100 million today. Reflecting the burden of the increasingly competitive auto business, Finance Division earnings climbed at a compound rate of less than 3% annually from 1964 to 1968 while the average short-term borrowing cost struck a comparatively modest mean of 5.0%. Accordingly, since 1968, Finance profits have increased almost 8% annually despite a more onerous 7.1% average short-term borrowing cost over that span.

Particularly noteworthy, and obviously key to C.I.T.'s earnings record, has been the outstanding profit performance (through 1974) of the National Bank of North America. In acquiring the Meadow Brook National Bank in 1965, C.I.T. took control of a relatively poorly managed, retail-oriented, Long Island-based bank with a dismal earnings record. However, as an amalgam of many smaller Long Island banks that had merged with it, Meadow Brook was a good-sized institution, holding roughly $750 million in deposits and ranking among the nation's 50 largest banks at the time. Of prime importance, the institution operated 66 established branches in the rapidly growing Long Island region. C.I.T. then moved quickly to beef up management, increase efficiency, and consolidate and develop the Bank's potent, if unexploited, Long Island presence. In addition, C.I.T. aggressively brought the institution into New York City. Aided significantly by the 1967 acquisition of the Bank of North America, and somewhat less by the 1970 additions of Trade Bank and Trust Company of New York and the First National Bank of Yonkers, the surviving National Bank of North America was transformed into a semi-money center institution, with a strong position on the New York area banking scene, and an increasingly noticeable penetration into national and international lending markets. The Bank's dramatic earnings expansion reflects significant internal development and the efficiencies and benefits inherent in successfully melding in the acquired institutions as well as fully digesting and consolidating Meadow Brook's previous acquisitions.

Insurance earnings have actually trended downward over the 12-year span, save for an interval of growth in the 1970-1974 period. This indifferent record is actually the product of diverging trends between the life & health and property & casualty companies, as is illustrated in the table below.

(See table on following page)

EXHIBIT J, ANNEXED TO COMPLAINT

Insurance Earnings Breakdown
(In thousands)

	Life & Health	Property & Casualty
1975	$14,119	($ 748) (a)
1974	13,106	2,131
1973	11,757	3,060
1972	10,065	3,007
1971	8,664	2,865
1970	8,778	2,621
1969	9,029	2,583
1968	8,862	4,328
1967	8,946	6,452
1966	7,853	7,290
1965	7,796	7,264
1964	7,862	6,770
% Change from Prior Year		
1975	+ 7.7%	N.M.
1974	+11.5	−30.4%
1973	+16.8	+ 1.8
1972	+16.2	+ 5.0
1971	− 1.3	+ 9.3
1970	− 2.8	+ 1.5
1969	+ 1.9	−40.3
1968	− 0.9	−32.9
1967	+13.9	−11.5
1966	+ 0.7	+ 0.4
1965	− 0.8	+ 7.3

(a) Net Loss.
N.M. Not meaningful.

Some of the validity of the above Property & Casualty comparison is reduced by the fact that significant capital gains were taken on investments in the 1964-1968 period, while gains since then have been relatively minor. Removing after-tax capital gains, 1964-1968 P&C earnings are $3.9 million, $4.4 million, $4.8 million, $4.6 million, and $3.0 million, respectively. Nevertheless, the basic trend of flat to down P&C earnings remains unchanged, even after the adjustment for capital gains.

After an essentially stagnant performance from 1964 to 1971, life and health earnings have increased significantly in recent years as the company has sharply expanded writings through independent agents of group and individual life (mainly term insurance) and health coverages unrelated to C.I.T. consumer loans. Naturally, the accounting adjustments made necessary by the adoption of generally accepted accounting principles (GAAP) in the life insurance industry aided life and health earnings comparisons, since the old statutory accounting principles *penalized* a rapidly-growing company. The property & casualty company's disappointing performance reflects a complete transformation of the enterprise's thrust as

C.I.T. has moved away from financing and insuring automobiles. What had (in the mid-1960's) been an active auto insurer covering cars financed by C.I.T. has evolved into a much smaller diversified insurer participating in an assortment of reinsurance pools and syndicates, with a modest book of C.I.T. loan-related mobile home coverages and only a tiny, vestigial piece of the automobile market. Essentially, the company has been struggling to achieve a new identity over the past decade.

The uneven record of the Manufacturing and Merchandising Division reflects the serious operating problems encountered at Picker and the Gibson greeting card operation in the 1969-1972 period, as well as the significant, but highly volatile, contributions of the economically sensitive All-Steel Equipment Co. Reportedly, Picker recorded a net loss in 1970 as the mismanagement of the late-1960's culminated in a disastrous 11-week strike at both of the company's key Cleveland plants. However, both Picker and Gibson have recorded improved results in recent years, with Picker's 1974 and 1975 comparisons believed to have been especially dramatic.

Management

C.I.T. appears to be an especially well-run finance company managed by highly capable and conservative executives. Top management possesses particularly strong financial skills, and tight cost controls and detailed operating plans and budgets are an important part of the management process. Although operating in a business that is obviously inherently risky, managers appear to approach the business and consumer finance enterprise with a relatively conservative, cautious approach. C.I.T. has avoided the occasional debilitating losses that have plagued some other diversified finance companies.

The company takes a "decentralized" approach to the managing of National Bank of North America and the other non-finance subsidiaries. Each unit has its own separate management team and is essentially run independently, although policy is set and progress is monitored actively by top executives of C.I.T., by means of both monthly financial reports and memberships on the companies' Boards (which also meet monthly). Nevertheless, direction of day-to-day activities is the responsibility of the subsidiary's chief executive officer, who is assisted by his management staff. As might be expected, all financing activities are directed by C.I.T., and the C.I.T. corporate staff provides specialized services in such areas as law, personnel, accounting, taxes, insurance, marketing, advertising and public relations. There is no doubt in this analyst's mind that, in practice, C.I.T. exerts firm control over all its subsidiary businesses, and is promptly aware of developing trends in those enterprises – a statement that cannot be made about many of the other companies in the consumer and commercial finance industries.

In this regard, it would appear that some observers have tarred C.I.T. management with the same brush of "poor acquisition strategy" and "inferior control of the non-finance business" that has been applied to some other finance concerns. It is this analyst's contention that this accusation has much less validity when applied to C.I.T.

Certainly – and with last year's results notwithstanding – National Bank of North America's excellent earnings record through 1974 appears to belie such an attack. As discussed previously in this report, C.I.T. took a poorly managed, largely undeveloped suburban bank in Meadow Brook (the original bank acquisition) and through rapid internal development and

selective additional acquisitions dramatically increased the surviving institution's earnings while transforming it into a significant institution. The 1975 earnings collapse came about largely because of the severe domestic recession and the bank's very heavy asset-weighted interest sensitivity, which has been necessary to partially offset the staggering liability sensitivity of the Finance division. As to the loan loss situation, although C.I.T. was perhaps less than prudent in allowing the bank to develop such a high exposure in the REIT and direct real estate lending areas, it is certainly true that quite a few other "prestige" banks made the same mistake. Unfortunately, along with its imbalanced funding, NBNA, as a domestic-oriented institution, did not have the cushion of exploding overseas earnings to shelter the U.S. margin and loan loss problems. Thus, despite last year's results, this analyst is still convinced that C.I.T. has done a good job with NBNA. Clearly, as was made evident in the *Operating Record* section of this report, C.I.T.'s earnings record over the past decade would have shown a great deal of volatility without the presence of the imbalanced, asset-weighted bank to offset the money cost-determined Finance bottom line.

Especially good progress has been made with Picker Corporation, which experienced severe operating problems in the late 1960's. However, over the last few years, internal operating problems have been solved and profitability has expanded dramatically. Improvements have also been made in the formerly troubled greeting card operation at Gibson. Especially noteworthy, the life and health insurance company has compiled a good earnings record since 1971, despite declining credit-related coverages, as the company has sharply increased its penetration in non-affiliated writings, specifically the burgeoning term life insurance business. The property and casualty company was led through a complete transformation of its thrust without wrenching dislocation, although earnings have necessarily eroded as the firm has shrunk in size. Undoubtedly, last year's net loss was partially due to poor selection of reinsurance risks, but it would seem that the unexpectedly poor operating environment that affected the whole P&C industry also played a role in the disappointing underwriting results.

On balance, it seems unfair to indict present C.I.T. management for its performance on the diversification front. On the contrary, it is this analyst's opinion that a fairly good job has been done with the non-finance businesses.

Nevertheless, it should also be noted that the existing management groups in several of the subsidiaries are not among the strongest in their industries. Certainly, National Bank of North America must be included here – although the bank is believed to have strengthened its middle management ranks somewhat, and this problem is not as glaring as it was a few years ago. Also, it seems apparent that substantial problems still exist at Gibson.

Key corporate executives of C.I.T. are listed below.

(See table on following page)

Name	Position	Age	Years With C.I.T.
Walter S. Holmes, Jr.*	Chairman & Chief Executive Officer	56	17
Todd G. Cole*	President & Chief Administrative Officer	55	7
Charles S. Jensen*	Executive Vice President – Business and Consumer Financing Division	62	39
Richard H. Lund*	Vice President – Finance	56	16
H. Anthony Ittleson*	Vice President – Marketing	38	15
Robert L. Strawbridge*	Vice President – Manufacturing and Merchandising	59	7
John H. Vogel*	President – National Bank of North America	58	41
Charles L. Wingfield	Executive Vice President & Chief Administrative Officer – National Bank of North America	50	25
Paul C. Colette	President – North American Insurance Companies	50	14

* *Member of the Board of Directors.*

C.I.T. has a distinguished Board of Directors that is weighted toward "outside" representatives. Of the 16 seats, nine are hold by well-known executives from other corporations, Wall Street, educational institutions, or public accounting firms.

Accounting

C.I.T.'s accounting methods stand generally at the conservative end of the spectrum of industry practice. Precomputed charges on consumer and industrial financing and leasing installment accounts are deferred and credited to income at a constant ratio to the receivable balance outstanding, beginning in the month of acquisition. No initial credit to income is taken to cover costs of acquiring personal loans, although a small acquisition fee is booked on mobile home and automobile loans.

Loss reserves are established at the time loans are booked, at fixed percentages for the various classes of receivables outstanding. The percentages are based on past charge-off experience, the nature and characteristics of the notes, and general economic conditions. These allocations have proven conservative and have almost always exceeded actual writeoffs. Accounts are charged off on a judgmental basis as soon as the probability of loss is established – based on an evaluation of the debtor's financial condition and underlying collateral or guarantees. Also, accounts are charged off automatically as follows: personal loan accounts when two contractual installments are not received within nine months; mobile home, motor vehicle, and other consumer accounts when any installment is more than six months past due; and factoring customer receivables when an account is more than six months late.

Leasing transactions are reported in accordance with the financing method of accounting, with net income from transactions recorded at a constant ratio to the net receivable balance outstanding, beginning in the month of acquisition. Obviously, included in the calculation are investment tax credit benefits (which are all amortized), tax timing differences, and estimated residual values. Amortization of previously deferred investment tax credits contributed 14¢ a

share to earnings in 1974, and 12¢ a share in 1975. C.I.T.'s substantial leasing activities create a significant deferral of tax liability, so of a total tax expense shown of $57.9 million in 1975, only about $22 million was paid in cash. Residual values on lease transactions are estimated at two-thirds or less of an independent appraiser's projection of realizable salvage value of the equipment. This formula has resulted in credits to income on eventual disposition of leased equipment in all past years.

Accounting policies of C.I.T.'s other divisions are believed to be closely in line with accepted practices in their respective industries.

C.I.T.'s pension plan had no unfunded past service liability at December 31, 1975, although the M&M companies have a deficit on this account of $7.7 million, and NBNA has a shortfall of $5.2 million. Recent requirements of ERISA will produce a small, but as yet uncalculated, liability for the parent C.I.T. as well.

C.I.T. showed $137 million in goodwill on its balance sheet at the 1975 year-end, nearly all of which was generated by the acquisition of National Bank of North America.

Financial Presentation – Disclosure

C.I.T.'s financial disclosure policies rank with the very finest among financial services companies. Complete, highly instructive financial statements are disclosed annually for each of the company's four divisions, and full income statements for each segment are distributed quarterly. C.I.T.'s annual "Supplemental Financial Information" booklet is a model for the entire consumer and commercial finance industry, with its disclosure of virtually every statistic an analyst can reasonably expect to use. Included in the document is a complete breakdown of delinquency, net chargeoffs, and loss reserves *by loan category*. Given the recent inclusion of a complete breakdown of National Bank of North America's net interest income calculation, the bank's disclosure policies can now be considered roughly comparable to most independent money-center banks, although quarterly net interest income totals are still not revealed regularly.

Business Characteristics

Finance Business

A breakdown of C.I.T.'s receivable growth by category over the last 12 years is presented below, followed by a discussion of each type of loan.

(See table on following page)

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June 15, 1976 -30-

Receivables Outstanding
(In millions)

	Personal Loans	Mobile Homes	Motor Vehicles	Other Consumer	Industrial Financing	Leasing	Factoring & Comm. Fin.	Wholesale Financing	Total Net Receivables (a)
1975	$1,008	$505	$ 77	$ 58	$1,009	$665	$510	$ 38	$3,203
1974	1,021	534	115	60	907	607	424	48	3,076
1973	911	527	143	59	725	587	435	72	2,894
1972	782	448	163	68	582	563	409	57	2,566
1971	710	358	217	83	569	561	372	48	2,434
1970	700	321	424	103	616	585	404	41	2,684
1969	634	260	806	120	618	529	402	243	3,112
1968	535	146	889	131	554	327	416	331	2,943
1967	448	80	879	137	587	197	408	263	2,660
1966	362	64	972	127	626	124	407	313	2,690
1965	309	47	1,012	132	590	65	366	322	2,578
1964	276	43	1,010	120	603	46	327	282	2,474
Percentage Change from Year Earlier									
1975	– 1%	– 5%	–33%	– 3%	+11%	+10%	+20%	–21%	+ 4.1%
1974	+12	+ 1	–20	+ 2	+25	+ 3	– 3	–33	+ 6.3
1973	+16	+18	–12	–13	+25	+ 4	+ 6	+26	+12.8
1972	+10	+25	–25	–18	+ 2	0	+10	+19	+ 5.4
1971	+ 1	+12	–49	–19	– 8	– 4	– 8	+17	– 9.3
1970	+10	+23	–47	–14	0	+11	0	–83	–13.8
1966	+19	+78	– 9	– 8	+12	+62	– 3	–27	+ 5.7
1968	+19	+83	+ 2	– 4	– 6	+66	+ 2	+26	+10.6
1967	+24	+25	–10	+ 8	– 6	+59	0	–16	– 1.1
1966	+17	+36	– 4	– 4	+ 6	+91	+11	– 3	+ 3.5
1965	+12	+ 9	0	+10	– 2	+41	+12	+14	+ 4.1

(a) Net of unearned charges and the reserve for losses. Thus, total of the categories will not add across.

Personal loans involve the direct lending of money to individuals (chiefly married couples where both spouses sign), repayable in monthly installments. Such accommodations are made for a variety of purposes. Among the most common reasons are consolidation of several outstanding debts, medical and dental expenses, repair of an automobile, vacations or educational fees. Loans are often re-financed with additional monies lent several times before the obligations are paid in full. Personal loans are made under the purview of "small loan laws" passed by individual state legislatures which regulate the rate, maximum size, and various other loan terms. C.I.T.'s average personal loan size is currently about $1,100. The average rate of charge on the entire portfolio is believed to be about 19%, although the largest loans command a lower yield. Outstandings have increased at a dynamic 13% average annual pace over the past 12 years, reflecting rapid expansion in C.I.T.'s lending office network, both internally and through acquisitions, and about 10% average annual growth in the total market.

C.I.T. is one of the nation's largest **mobile home** lenders. The company works through individual dealers in acquiring business, purchasing from the retailer installment sales contracts arising from the sale of these units. C.I.T.'s position is secured by a security interest

in the home and by physical damage insurance covering the unit's value as well as by the endorsement (repurchase agreement) of the dealer. The interest rate charged on mobile home outstandings averages about 13.5% to the consumer, while the yield to C.I.T. net of dealer reserves and endorsement fees is roughly 12.5%.

Motor vehicle loans have declined steadily over the past decade as C.I.T. has virtually deserted this market. The largest independent auto loan company in the world in the early 1960's, C.I.T. decided that the relatively low fixed rate of interest (about 10%-12%) and high operating expenses related to this business rendered it less attractive than other types of financing. Consequently, C.I.T. turned its back on the intensely competitive auto loan business and essentially "gave" the market to the automobile manufacturers' own captive finance companies, which use it as a sales tool.

Other consumer loans consist mainly of educational tuition financing, and farm equipment loans.

Industrial financing involves the financing of income-producing machinery or equipment, such as heavy construction tractors and implements. Actually, the construction industry is C.I.T.'s largest single commercial finance market. Loans are made directly, with the equipment being assigned as collateral for the note, and accommodations are also made through the purchase of installment sale obligations from the dealers selling the units. Industrial financing obligations were roughly flat through 1972 largely because of sluggish trends in heavy equipment used for highway construction. The average yield on industrial financing obligations is in excess of 13%.

C.I.T.'s **leasing** activities cover various types of machinery and equipment such as jet aircraft, railway cars and locomotives, computers, marine cargo containers, marine vessels (chiefly tankers), and fleets of automobiles. Also financed are hospitals, nursing homes, educational residences and dining halls and other types of income-producing buildings. Leasing obligations have expanded dramatically during the last decade but have been held down in some recent years by an unavailability of taxable income to make use of related tax sheltering benefits.

Factoring activities for the company involve the purchase, on a non-recourse basis, of accounts receivable of manufacturers and distributors in the textile, furniture, shoe, and apparel industries, among others. The credit risk and responsibility to collect the notes are generally assumed by C.I.T. Direct advances are also made, either unsecured, or secured by inventory, machinery or equipment. **Commercial financing** involves the granting of loans secured only by the *pledge* of accounts receivable, and not the actual sale of the paper. Depending on the credit standing of the borrower, the rate charged on factoring and commercial financing relationships ranges from 2% to 6% over the bank prime rate and is adjusted monthly in response to changes in the prime. Combining the volume of the company's Meinhard-Commercial and William Iselin factoring subsidiaries, C.I.T. is the largest *domestic* factoring company by a significant margin (ahead of United Factors). However, the company's share of the total domestic factoring market eroded to 12.2% in 1975 from 13.9% in 1971, in the face of active competition.

Wholesale financing is the financing, or "floor-planning," of the inventories of retail dealers in durable goods such as mobile homes, factory trucks, and automobiles. Rates of charge are tied to a small spread over the prime rate. C.I.T.'s floor-planning loan volume has declined sharply, reflecting the company's retrenchment in the automobile area.

Total receivables for C.I.T. have advanced at less than a 3% annual rate over the last 12 years. However, if motor vehicle obligations and wholesale receivables are excluded from the calculation to give a true "continuing operations" comparison, the growth rate is roughly 9%.

Loan Losses

C.I.T.'s control of loan losses has been excellent, as is illustrated in the table below. Loss experience on both consumer and commercial loans has been among the very lowest in the finance industry.

Net Losses as a Percentage of Average Net Outstandings

	1968	1969	1970	1971	1972	1973	1974	1975
Personal loans	1.54%	1.36%	1.88%	1.90%	1.55%	1.51%	1.83%	1.99%
Mobile homes	–	–	–	0.07	0.14	0.13	0.33	0.40
Other consumer	0.38	0.43	0.72	0.71	1.00	(0.15) (a)	0.56	0.56
Industrial fin. & leasing	0.22	0.26	0.55	0.71	0.18	0.05	0.18	0.35
Factoring & comm. fin.	0.72	0.66	1.21	0.97	0.62	0.51	1.41	1.76
Wholesale financing	–	0.08	1.55	0.40	(0.18) (a)	(0.27) (a)	0.11	1.15
Corporate average	0.53%	0.55%	1.00%	0.93%	0.65%	0.48%	0.83%	0.93%

(a) Net recoveries.

Writeoffs did increase in 1970, 1971, 1974, and 1975, in reaction to sluggish economic conditions. Attention is called to the particularly good credit experience attached to industrial financing and leasing activities, reflecting the extensive collateralization of those obligations. In addition, it is interesting to note that for all the hue and cry in some circles about the "riskiness" of mobile home lending, C.I.T.'s writeoffs in this area have been well controlled. Unlike some other lenders, C.I.T. has taken a conservative, disciplined approach to the business.

C.I.T. maintains the loan loss reserve at about 1.30% of net receivables, a level well above any one year's losses.

Banking

National Bank of North America is the 36th largest commercial bank in the United States (ranked by deposits). It operates 140 offices throughout the Greater New York metropolitan area, of which 100 are located on Long Island (including the Borough of Queens) and 16 in Westchester County. Only 14 branches are operated on Manhattan Island. Clearly, the bank's retail market base is on Long Island. In total, NBNA serves about 400,000 individual account holders. In addition, the bank does a substantial corporate business both in New York City and the nation, although its participation in national lending markets is obviously not in the role of a lead bank.

Almost 30% of the bank's loan portfolio stems from the International Division, although the bank has no foreign branches (save for one offshore "post office box" in the Bahamas). Business is generated through participations with correspondent banks. NBNA's strongest

overseas position is in Latin America, which represents more than 40% of international loans. Most of the bank's foreign lending represents participations in medium term syndications, although about 40% of loans represent direct lending with maturities of a year or less.

As indicated by the table below, a quite large proportion of the bank's funding needs are provided by traditional deposit sources. Although dependence on certificates of deposit and other "money market" funding sources has grown in recent years (as it has for virtually all large banks), interest-sensitive funds represented an average of less than 34% of earning assets in 1975, a relatively low percentage for a bank of NBNA's size.

(See table on following page)

National Bank of North America
Earning Asset-Liability Growth
(Average daily balances – in millions)

	1971	1972	1973	1974	1975
Earning Assets					
Loans (a)	$1,286	$1,516	$1,708	$1,732	$1,788
Investments	523	498	440	500	462
Redeposits	29	42	69	193	230
Federal funds sold & repos.	21	30	39	25	16
Total earning assets	$1,859	$2,086	$2,256	$2,450	$2,496
Supporting Liabilities					
Interest-free funds					
Demand deposits	$ 860	$ 905	$ 927	$ 911	$ 900
Shareholders' equity	154	175	193	205	217
Total interest-free funds	$1,014	$1,080	$1,120	$1,116	$1,117
Interest-insensitive funds					
Savings & time deposits	$ 652	$ 688	$ 697	$ 728	$ 805
Capital notes & debentures	22	21	20	19	18
Total interest-insensitive funds	$ 674	$ 709	$ 717	$ 747	$ 823
Interest-sensitive funds					
Certificates of deposit	$ 257	$ 315	$ 394	$ 499	$ 452
Eurodollar deposits	156	236	238	293	305
Federal funds purchased & repos.	42	50	50	53	59
Other borrowings	3	0	35	56	25
Total interest-sensitive funds	$ 458	$ 601	$ 717	$ 901	$ 841
Interest-free funds as % of total earning assets	54.5%	51.8%	49.6%	45.6%	44.8%
Interest-insensitive funds as % of total earning assets	36.3%	34.0%	31.8%	30.5%	33.0%
Interest-sensitive funds as % of total earning assets	24.6%	28.8%	31.8%	36.8%	33.7%

(a) Net of unearned income and the reserve for loan losses.

Total earning assets have expanded at a compound rate of almost 8% annually over the 1971-1975 period, chiefly because of the growth in the loan portfolio. Re-deposit activity expanded in 1974 and 1975 only because of the relatively weak loan demand, and the "book" will be drawn down as loan volume strengthens.

Although demand deposits have risen a net of only 5% since 1971, consumer savings and time deposits have posted *relatively* good growth, compounding about 5% annually.

Given the only modest growth in traditional deposits, quicker expansion of CD's and Eurodollar deposits has been necessary to meet funding needs. The bank makes very limited use of money market dealers to place CD's in the national money market. As indicated by the table, only minor use is made of the sometimes volatile Federal funds market.

Reflecting NBNA's conservative capitalization and high dependency on traditional deposit sources for funding, margins have been maintained in a relatively high range, although they have necessarily fluctuated substantially in line with swings in the prime rate. Accordingly, the sluggish trend of earning assets, coupled with the sharp decline in the prime rate last year, brought about a significant 9% decline in net interest income in 1975. Actually, these factors alone brought about only a 4% drop in net interest earnings, since $6 million of the shortfall was due to increased loss of interest income on non-accrual or renegotiated loans. NBNA is known to have been a relatively "high rate" bank that has maintained firm pricing in recent years.

Recent-year net margin trends are summarized below.

National Bank of North America
Net Margin Trends
(In millions)

Year	Average Earning Assets	Interest Revenue as % of Average Earning Assets	Interest Expense as % of Average Earning Assets	Net Interest Margin	Net Interest Income (a)
1975	$2,496	8.65%	4.25%	4.40%	$109.9
1974	2,450	10.35	5.44	4.91	120.4
1973	2,256	8.56	4.10	4.46	100.6
1972	2,086	7.16	3.01	4.15	86.7
1971	1,859	7.59	3.06	4.53	84.2
Year-to-Year Change					
		Basis Points			
1975 vs. 1974	+ 2%	+170	+119	−51	− 9%
1974 vs. 1973	+ 9	+179	+134	+45	+20
1973 vs. 1972	+ 8	+140	+109	+31	+16
1972 vs. 1971	+12	− 43	− 5	−38	+ 3

(a) On a taxable equivalent basis.

NBNA's holdings of New York City and New York State obligations in the investment portfolio are significant, as illustrated below.

New York City & State Obligations Held
at December 31, 1975
(In millions)

	Market Value	Amortized Cost
New York City		
General obligation bonds	$ 25.8	$ 37.3
Notes	4.8	8.0
Total New York City paper	$ 30.6	$ 45.3
New York State		
General obligation bonds	$ 53.7	$ 60.9
Municipal Assistance Corporation bonds	17.6	21.2
Total New York State paper	$ 71.3	$ 82.1
Grand total	$101.9	$127.4

These securities are carried at their amortized cost in the bank's financial statements. The difference between cost and market value, $25.5 million at December 31, 1975, represented 11% of the institution's equity capital. Actually, the total cost-market value differential in the bank's investment account was $65 million at year-end, or 29% of equity. This additional "negative spread" resulted from some relatively low-rate municipals in the portfolios of banks NBNA acquired. However, it should be noted that there was a significant narrowing of this differential during the first quarter.

Recent year non-interest expense totals for NBNA are presented below. Reflecting the bank's extensive branch operation, non-interest expenses are a fairly substantial burden. Also, although significant improvements have been made recently, NBNA's operations are believed to have been relatively inefficient in past years as the acquired banks were integrated and some duplication of effort persisted. National's new operations center in Huntington, Long Island will eventually eliminate the three separate operations centers now serving the bank's needs.

National Bank of North America
Non-Interest Expense Analysis
(In thousands)

	Total Compensation Expense	Occupancy	Supplies & Services	Other Expense	Total Non-Interest Expense	Number of Branches (a)	Total Non-Int. Expense Per Average Branch (b)
1975	$45,793	$12,456	$12,539	$11,042	$81,830	139	$597
1974	42,288	11,672	11,598	9,614	75,172	135	583
1973	37,141	10,252	10,480	7,481	65,354	123	534
1972	34,740	9,580	8,425	6,600	59,345	122	492
1971	33,348	9,224	7,546	6,566	56,684	119	484
1970	28,487	7,283	6,176	8,139	50,085	115	479
1969	23,434	6,348	5,226	7,290	42,298	94	460
1968	20,737	4,967	4,699	5,896	36,299	90	410
% Change from Prior Year							
1975	+ 8.3%	+ 6.7%	+ 8.1%	+14.9%	+ 8.9%		+ 2.4%
1974	+13.8	+13.9	+10.7	+28.5	+15.0		+ 9.2
1973	+ 6.9	+ 7.0	+24.4	+13.3	+10.1		+ 8.5
1972	+ 4.2	+ 3.9	+11.6	+ 0.5	+ 4.7		+ 1.7
1971	+17.1	+26.7	+22.2	−19.3	+13.2		+ 1.0
1970	+21.6	+14.7	+18.2	+11.6	+18.4		+ 4.1
1969	+13.0	+27.8	+11.2	+23.6	+16.5		+12.2
Compound Annual Growth							
1968-1975	11.8%	13.4%	16.1%	6.8%	11.9%		5.1%

(a) At year-end.
(b) Average of year-end branch totals.

Bank's Loan Loss Record is Poor

As indicated by the table below, National Bank of North America's loan loss record has been disappointing in recent years.

National Bank of North America
Loan Loss Analysis
(In thousands)

	1969	1970	1971	1972	1973	1974	1975
Provision for losses	$2,717	$2,962	$4,393	$ 8,119	$8,840	$11,127	$20,700
Loans charged off	4,617	4,346	7,682	16,126	9,926	19,832	22,609
Less: recoveries on loans previously charged off	1,900	1,558	2,133	1,568	1,761	3,699	1,980
Net chargeoffs	$2,717	$2,788	$5,549	$14,558	$8,165	$16,133	$20,629
Provision/avg. loans	0.29%	0.27%	0.33%	0.52%	0.51%	0.63%	1.13%
Net chargeoffs/avg. loans	0.29	0.26	0.42	0.93	0.47	0.91	1.12
Reserve/year-end outstandings	2.72	2.50	2.11	1.44	1.46	1.10	1.18

Annual net chargeoffs to average loans outstanding struck a fairly reasonable mean of 0.33% in the 1966 through 1971 period, but have averaged 0.85% in the four-year span since then, one of the very poorest performances among comparably sized or larger banks. However, it should be noted that NBNA's writeoffs are necessarily inflated by its proportionally quite heavy outstandings to the high-yield, high-risk areas of real estate (particularly construction and development loans) and consumer lending. Thus, the exercise of comparing NBNA's loan loss record to other money-center or regional banks is not entirely valid. The bank was particularly vulnerable to the construction and real estate industries that have suffered so badly (particularly in the New York area) in the past few years.

Life and Health Insurance

C.I.T.'s wholly-owned subsidiary, the North American Company for Life and Health Insurance, provides credit life and health insurance, both by direct writing and assumed reinsurance, in connection with C.I.T.'s consumer financing activities. Insurance is written on the lives and health of personal loan, mobile home, and automobile borrowers. However, premiums written for finance customers have actually been declining in recent years, from a peak of $22.4 million in 1972 to $13.8 million in 1975, reflecting C.I.T.'s de-emphasis of automobile lending and the slackening trends in mobile home and personal loan growth.

The fast-growing segment of the business has been conventional life and health insurance. Along with writing individual life and health coverages, North American is a major factor in the group insurance market, offering life and health insurance through a network of over 700 independent agents located in all states except New York. The company has been particularly successful in marketing term life insurance coverage in recent years, and total life premium volume is now significantly larger than health coverage billings. Finance customers represented only 21% of premiums written in 1975.

Property and Casualty Insurance

The North American Company for Property and Casualty Insurance provides insurance against fire, theft, collision, and other physical damage risks. Coverages are written on mobile homes, cars, and other collateral for C.I.T. consumer loans, as well as being offered directly through independent agents. Actually, the fastest growing (and dominant) source of premium income has been the company's participation in pools and syndicates covering both primary and reinsurance risks involving a broad variety of coverages, including fire and allied lines, ocean and inland marine, and casualty and surety.

C.I.T.'s P&C insurance operation has made a pronounced transition from an automobile insurance company covering cars financed by C.I.T. to its present diversified interests. In 1968, 85% of premiums written stemmed from finance customers. In 1975, this percentage was down to about 17%, while participations (zero in 1969) represented about 69%, and independent-agent-generated business about 14%.

Manufacturing and Merchandising

Picker Corporation

Picker manufactures and markets a complete line of X-ray equipment and accessories, ultrasound equipment, nuclear instrumentation, and radioactive isotope devices for clinical diagnosis and laboratory uses. Products are sold to hospitals, clinics, and individual doctors through a network of 26 sales and service offices in the United States and 12 in Canada. Also, the company's units are marketed in more than 70 foreign countries.

Picker was a family-controlled company that ran into problems in the late 1960's. Market position was lost as little was spent on research and development, manufacturing efficiency declined, and labor relations deteriorated. Reportedly, the company posted a net loss in 1970 as operations were crippled by a 11-week strike at the main plants. However, under C.I.T.'s stewardship the company has made a strong recovery, and profits have risen dramatically in recent years. Although C.I.T. does not disclose results of the individual companies, this analyst estimates that Picker's earnings may have totaled about $8.3 million in 1975, 55% of the M&M total of $15.0 million.

Gibson Greeting Cards, Inc.

Gibson is the nation's oldest creator, manufacturer, and distributor of greeting cards, gift wrappings, party goods, and other related paper products – and is among the largest of such firms. Greeting cards are marketed under the *Gibson*, *Pleasant Thoughts*, *Buzza*, and *Success* trademarks. The company's Cleo Wrap affiliate is believed to be the world's largest producer of gift wrapping paper.

In some past years, Gibson's greeting card lines encountered difficulties in this highly competitive business, and Cleo Wrap was the source of most of the company's profits, although Cleo represents only about 25% of Gibson's sales. However, a restructuring of the creative, sales, and merchandising efforts in 1972 has had a positive effect. Obviously, Gibson's business is highly seasonal, with the lion's share of profits posted at Christmas, and the remainder at the less important St. Valentine's Day and Easter holidays. Because of this influence, C.I.T.'s total Manufacturing and Merchandising group traditionally records about 45%-50% of its full-year earnings in the fourth quarter.

Taken alone, Gibson is believed to generate a little more than 15% of total M&M profits.

All-Steel Inc.

All-Steel is one of the nation's largest producers of metal office furniture. Office furniture and library fixtures are also manufactured and sold in Canada. All-Steel's results have been highly cyclical, reflecting capital spending patterns and trends in commercial construction. The company is believed to have generated about 25% of divisional net income in 1975.

Raco, Inc.

Formerly a subsidiary of All-Steel, Raco was carved out as a distinct entity in 1975. The company is the nation's leading manufacturer of electrical outlet boxes and fittings for the building industry. Raco's earnings may have represented nearly 10% of the divisional total last year.

Financial Condition

C.I.T.'s financial condition is [illegible] strong by all industry standards. Leverage has decreased from the level of the late 19[illegible] because of the retention of earnings in the intervening years, while the loan portfolio poste[illegible] nly modest net growth (held down by the sharp declines in auto loans). Recent-year capitalization data are presented below.

Capitalization
(In million)

	12/31/69	12/31/70	12/31/71	12/31/72	12/31/73	12/31/74	12/31/75
Short-term debt	$1,511	$1,233	$1,048	$1,110	$1,376	$1,479	$1,209
Subordinated debt	241	241	241	241	239	235	235
Senior long-term debt	1,212	1,057	922	918	1,001	1,143	1,354
Total debt capital	$2,964	$2,531	$2,211	$2,269	$2,616	$2,857	$2,798
Shareholders' equity	534	605	646	690	734	777	790
ST debt/total debt	51%	49%	47%	49%	53%	52%	43%
Total debt/shareholders' equity	555%	418%	343%	329%	356%	368%	354%

C.I.T. is one of the world's largest direct issuers of commercial paper. Borrowings are backed by roughly $900 million in bank lines of credit. Rating services accord the notes the highest rating of "Prime 1" and "A-1," while the company's bonds receive the second highest ranking of "AA" and "Aa." Accordingly, the company can borrow at lower rates than all but the other very largest finance companies. C.I.T.'s average borrowing rates for the past few years are presented below.

(See table on following page)

Weighted Average Borrowing Cost

	Short-Term	Long-Term	Total
1975	6.80%	6.13%	6.45%
1974	10.02	5.59	8.04
1973	7.97	5.28	6.72
1972	4.65	5.19	4.93
1971	5.06	5.22	5.15
1970	7.75	5.27	6.51
1969	7.56	5.07	6.27
1968	5.96	4.80	5.34

As shown by the above data, swings in the average short-term borrowing cost exert the most profound effect on the company's total cost of debt capital. The average rate paid on long-term borrowings will continue to trend gradually upward as older bond issues sold in previous decades mature and are rolled over at the higher rates now prevalent. Unfortunately, this process will be particularly painful for C.I.T. in 1976, since $100 million of 4% subordinared notes matured and were paid off on February 1. A recent $200 million public debrnture offering (sold in mid-April) replaced these and other recent maturities. However, the issue was placed to yield 8.16%, indicating a $4 million increment to annual interest expense on the replacement of the subordinated notes alone.

As illustrated below, C.I.T.'s debt maturities are fairly substantial over the next few years. The 1977 refunding will not be too onerous, since that debt is at an average rate of almost 7%. However, the average interest rate being paid on the 1979 and 1980 maturities is less than 5%.

Long-Term Debt Maturities
(In millions)

1977	1978	1979	1980
$111	$12	$153	$109

At December 31, 1975,C.I.T.'s capital stock consisted of 20.4 million common shares and 0.4 million of $5.50 serial preferred shares (actually in two roughly equivalent sized issues). Full conversion of the preferred series would result in issuance of just over 1 million common shares.

Dividends

C.I.T.'s dividend growth has not quite matched its earnings record in either magnitude or consistency of increases. However, hikes in the payment have been posted in most recent years. In this analyst's opinion, a modest increase in the dividend is likely late this year. The company's current policy is to maintain the payout in the vicinity of 50% of earnings. In the relatively cheap borrowing cost climate of the early nineteen-sixties the payout exceeded 60% for a time.

EXHIBIT J, ANNEXED TO COMPLAINT

A record of recent-year dividend payments is presented below.

Dividend Record
(Per common share)

	1970	1971	1972	1973	1974	1975
Dividends paid	$1.80	$1.90	$2.00	$2.15	$2.20	$2.20
Reported earnings (a)	3.20	3.68	4.02	4.15	4.02	4.21
Payout %	56%	52%	50%	52%	55%	52%

(a) Fully diluted "operating" earnings (before currency adjustments) as originally reported.

H. C. WAINWRIGHT & CO.
Andrew C. Halvorsen

EXHIBIT K, ANNEXED TO COMPLAINT.

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RADIO AND CABLE ADDRESSES
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"COTTOFRANK PARIS"

June 24, 1976

Dear Mr. Greenspoon:

This is to confirm that, as I indicated when we spoke by telephone yesterday, it is our position that any summary published in The Wall Street Transcript of a research report prepared and copyrighted by H. C. Wainwright & Co. constitutes an infringement of Wainwright's copyright therein. Such summary would at most constitute a derivative work for which consent of the proprietor of the copyright in the underlying work (i.e., the Wainwright Report) must be obtained. As you know, H. C. Wainwright & Co. has not consented to such use of its reports by The Wall Street Transcript.

You indicated during our telephone conversation that you had drafted a summary of a Wainwright Report concerning C.I.T. Financial Corporation. From your description, it would appear that the summary reveals the results of H. C. Wainwright & Co.'s analysis of C.I.T. Financial Corporation and traces the division by division analysis contained in the report. Such a summary would clearly constitute an infringement of Wainwright's copyright.

Pursuant to Section 101(b) of the Copyright Act (17 U.S.C. §101(b)) we hereby give notice that any

CAH

EXHIBIT K, ANNEXED TO COMPLAINT

summary of the kind set forth in your letter to us dated June 17, 1976 and, in particular, the summary of the Wainwright Report concerning C.I.T. Financial Corporation which you described to me during our telephone conversation on June 23, 1976, would constitute an infringement of H. C. Wainwright & Co.'s copyright therein.

Very truly yours,

(S)

Roy L. Regozin

Samuel N. Greenspoon, Esq.
Eaton, Van Winkle & Greenspoon
600 Third Avenue
New York, New York 10016

BY HAND

cc: Mr. Richard A. Holman

EXHIBIT L, ANNEXED TO COMPLAINT.

The Wall Street Transcript
July 5, 1976
Page 44,163

Andrew C. Halvorsen of H.C. Wainwright & Co. has issued a basic report on CIT FINANCIAL CORP. (31) dated June 15, 1976.

According to Halvorsen, CIT experienced an unbalanced year in 1975 with various pluses and minuses, with the minuses apparently predominating.

Among the pluses, Halvorsen listed the earnings benefits derived from lower short-term interest rates; and CIT's finance, manufacturing and merchandising, and life and health insurance divisions. The minuses, according to Halvorsen, were a somewhat disastrous year for CIT's banking business and property and casualty insurance business. He believes that short-term interest rates will rise sharply in 1976 which is a negative factor insofar as CIT is concerned, but such negative factor may be more than offset by the results of the finance division and of the National Bank of North America.

He appears to believe that the Bank will have increased earnings in the future but not at its former pace and that such increased earnings may well offset possible increases in short-term interest rates. He points out that because of the short-term interest rate decline in 1975, the finance division's earnings in that year increased about 37% although it did not do well in increasing its loan portfolio. On the other hand the Bank's profits declined to the point where without tax exempt income it would have shown a loss; he gives a number of reasons for the decline in the Bank's earnings, many of which appear to have been beyond the Bank's control.

Insofar as the insurance business of CIT is concerned, the gains of the life and health division were more than offset by the losses of other insurance divisions with the end result that the insurance business profits plummeted some 12% which was consistent with the experience of the industry.

On the other hand, CIT's manufacturing and merchandising divisions did well in 1975 with the exception of office furniture – CIT FINANCIAL CORP., Basic Report of H.C. Wainwright & Co. (Andrew C. Halvorsen), June 15, 1976. 41 pages. RP 3419]

Order to Show Cause and Restraining Order, Dated July 9, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Upon plaintiff's complaint, and the exhibits annexed thereto, and the affidavit of Robert L. Meyer, sworn to July 9, 1976, and the affidavit of Roy L. Regozin, sworn to July 9, 1976, it is

ORDERED, pursuant to Rule 65 of the Federal Rules of Civil Procedure that the defendants show cause at a motion term of this Court to be held *in Room 1903,* United States Court House, Foley Square, New York, New York on the *22nd day of July,* 1976, at 10:00 in the forenoon on that day or as soon thereafter as counsel can be heard why an order should not be made herein enjoining them (and their agents, servants, employees and all persons acting in concert with them or on their behalf) during the pendency of this action, (a) from publishing, selling, marketing or otherwise disposing of any copies of their abstracts (copies of which are attached to the complaint herein as Exhibits B, E, G, I and L) of plaintiff's research reports (copies of which are attached to the complaint herein as Exhibits A, D, F, H and J), (b) from infringing in any manner Wainwright's copyrights in such research reports, (c) from publishing, selling, marketing or otherwise disposing of any copies of any additional abstracts of any of plaintiff's copyrighted research reports, and (d) requiring defendants to deliver up to be impounded during the pendency of this action all copies or drafts of any abstracts of plaintiff's copyrighted reports in their possession or under their control, and all plates, molds, and other matter for making such abstracts.

Order to Show Cause and Restraining Order, Dated July 9, 1976

It further appearing to the Court that defendants' publication of abstracts of plaintiff's copyrighted research reports may be in violation of the Copyright Act as alleged in the complaint herein, and that defendants may thereby be engaged in unfair competition with plaintiff as alleged in the complaint herein, and that substantial, immediate and irreparable injury may result to plaintiff as a result of continued publication of said abstracts by defendants and possible publications by them of additional abstracts of plaintiff's copyrighted research reports be a preliminary injunction *and the parties herein having been heard, it is*

ORDERED, that defendants (and their agents, servants, employees and all persons acting in concert with them or on their behalf) be and they hereby are *temporarily* restrained pending the hearing and determination of plaintiff's motion for a preliminary injunction from

~~(a) publishing, selling, marketing or otherwise disposing of any copies of their abstracts (copies of which are attached to the complaint herein as Exhibits B, E, G, I and L) of plaintiff's research reports (copies of which are attached to the complaint as Exhibits A, D, F, H and J), and~~
M.E.L.

~~(b) infringing in any manner Wainwright's copyrights in such research reports, and~~
M.E.L.

(c) publishing, selling, marketing or otherwise disposing of any copies of any additional abstracts of any of plaintiff's copyrighted research reports *except with the approval of the Court on notice to the plaintiff*; and it is further

M.E.L.

Order to Show Cause and Restraining Order, Dated July 9, 1976

ORDERED, that security in the sum of *$1000.00* be posted; and it is further

ORDERED, that pursuant to Rule 4(c) of the Federal Rules of Civil Procedure that *Lawrence P. Thees* and *Richard C. Clifford, being over the age of 18 and not parties to the action,* are hereby appointed to serve the complaint, summons, this order to show cause, and the attachments thereto upon defendants; and it is further

ORDERED, that personal service upon defendants on or before *5 P.M.* o'clock, July *9,* 1976 shall be sufficient service of this order to show cause and supporting papers herein.

Dated: New York, New York
July *9,* 1976.

Issued at 4:35 P.M.

S/ MORRIS E. LASKER
U. S. D. J.

Items (a) and (b) of the restraining order have been stricken on the representation of defense counsel that the acts mentioned therein will not occur pending the disposition of this motion.

Affidavit of Robert L. Meyer, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. MEYER, being duly sworn, deposes and says:

1. I am a partner in the firm of H. C. Wainwright & Co. ("Wainwright"). I have been a member of Wainwright's Executive Committee since 1973 and a Director of Research for Wainwright since early in 1975. I submit this affidavit in support of Wainwright's motions for a temporary restraining order and preliminary injunction against defendants Wall Street Transcript Corporation and Richard A. Holman (the "Defendants").

2. As Director of Research for Wainwright I coordinate the research and marketing activities of the securities analysts employed by, or who are members of, Wainwright. At the present time Wainwright has approximately 25 securities analysts, more than one-third of whom, including myself, are Chartered Financial Analysts ("C.F.A."), a designation awarded to persons meeting certain standards of competency and conduct for the professional practice of investment management and investment securities research analysis.

3. Wainwright was organized in 1868 as a Massachusetts limited partnership. It presently conducts its operations from offices located in Boston, Massachusetts and New York City. It is a member of the New York, American, Boston, Midwest and PBW Stock Exchanges and is registered as a broker-dealer with the Securities and Exchange Commission pursuant to Section 15 of the Securities Exchange Act of 1934.

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4. Wainwright has been engaged in the institutional research field for approximately 40 years, and derives approximately 90% of its revenues and typically an even greater percentage of its profits from its institutional research operation which comprises approximately 80 professional people in the research, sales, trading and economic-investment departments.

5. Wainwright has over 900 clients of its institutional research business, including most of the major banks, insurance companies, mutual funds, investment counselors, pension funds and similar institutional investors throughout the Free World. Wainwright supplies these clients with continuous, in-depth analytical reports ("Research Reports") and services concerning approximately 30 industrial areas and approximately 275 industrial, financial, utility and railroad corporations which are engaged in such industries and which represent a broad cross-section of the economy of the United States, and, as measured by capitalization, account for the bulk of the market value of a typical institutional equity portfolio. The Research Reports are designed to provide a comprehensive and objective analysis of company and industry characteristics, with particular emphasis on current and future business, operating, competitive, financial and managerial trends.

6. Wainwright prepares and distributes a variety of Research Reports, including Basic Reports and Special Reports. A Basic Report provides an in-depth study of a company with particular emphasis on current operations and the near-term and longer-range outlook. It also presents a review of the company's historical operating record and contains sections concerning management, accounting policies, company and industry business characteristics, flow-of-funds and balance sheet analysis, and dividend policy. Basic Reports are always based upon

interviews with one or more company officials. A Special Report generally concerns a major development at a company, often leading to a change in the earnings projected by Wainwright.

7. The Research Reports are prepared by securities analysts who are employed by, or members of, Wainwright, each of whom specializes in one or more particular industries. In general, each securities analyst reviews surveys, studies and other material concerning the industry and companies engaged in the industry in which the securities analyst specializes, attends seminars at which representatives of companies engaged in the industry discuss developments in the industry and in their particular companies and meets individually with management representatives of such companies. Each securities analyst also follows developments in governmental and foreign affairs which could affect the industry. Wainwright's securities analysts also make extensive use of in-house research capabilities, including sophisticated computer analysis of industry and company trends generally relating them to macroeconomic variables, and sophisticated economic expertise from Wainwright's own staff and exclusively retained outside consultants from whom the economic assumptions upon which much of the research is based are obtained. From such research, the securities analyst develops conclusions concerning industry trends as well as business, operating, competitive, financial and managerial trends for specific companies engaged in the industry. The securities analyst sets forth his conclusions and the factual and analytical basis for them in Research Reports.

8. While all of the sources of information described above provide important inputs to the securities analyst, one should not overlook the fact that securities analysis

involves an innovative, creative element. Access to information is necessary, of course, but what distinguishes outstanding analysis is the ability of the securities analyst to perceive factors not apparent from a casual review of the data and accurately assess the implications of such factors for the industry or company involved.

9. A Basic Report usually requires several months for the securities analyst to prepare. When the securities analyst has prepared a final draft of a Basic Report, it is circulated within Wainwright and to members of the management of the company or companies concerned for comments. It is my responsibility to review the final draft and the comments, discuss them with the securities analyst and, in conjunction with Supervisory Analysts in Wainwright, approve the Basic Report in the form in which it is issued by Wainwright. A similar procedure of review and approval is employed with respect to Special Reports. The time required to prepare a Special Report varies depending upon the nature of the developments discussed and the impact the securities analyst anticipates the developments will have on an industry or particular companies engaged in such industry. In general, Special Reports require from several days to several weeks to prepare.

10. The following Research Reports are attached as Exhibits to Wainwright's complaint herein:

Exhibit A: Special Report dated April 13, 1976 concerning FMC Corp.;

Exhibit D: Basic Report dated April 27, 1976 concerning Overnite Transportation;

Exhibit F: Special Report dated April 28, 1976 concerning Monsanto Company;

Affidavit of Robert L. Meyer, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Exhibit H: Special Report dated April 30, 1976 concerning Eastman Kodak and Polaroid Corporation; and

Exhibit J: Basic Report dated June 15, 1976 concerning C.I.T. Financial Corporation.

Each copy of each such report prepared and distributed by Wainwright bears at the bottom of the first page the following notice:

"(c) H. C. Wainwright & Co. 1976".

Each copy also contains the following statement which appears beneath the foregoing notice:

"All rights reserved. No portion of this report may be reproduced in any form without prior written consent."

Wainwright has registered its claim to copyright in each of such reports by filing with the Register of Copyrights in Washington, D. C. a completed application on Form A provided by the Copyright Office together with two copies of the report and the required filing fee. Copies of the Certificates of Registration of Wainwright's claims to copyright in the Research Reports attached as Exhibits A, D, F and H to the complaint are included as part of such Exhibits. Wainwright has not yet received the Certificate of Registration of its claim to copyright in the Research Report attached to the complaint as Exhibit J.

11. The Special Report concerning FMC Corp. was prepared by W. D. Williams, who has functioned as a securities analyst at Wainwright since 1967. Mr. Williams specializes in the chemical industry and is a C.F.A. He spent approximately four days working on the Special Report. This does not include the time Mr. Williams

spent reviewing data concerning the chemical industry in general and FMC Corp. in particular. The Special Report contains Mr. Williams' analysis of recent developments at FMC Corp. and his projections and conclusions based upon such analysis.

12. The Basic Report concerning Overnite Transportation was prepared by Thomas A. Trantum who has been employed as a securities analyst by Wainwright since 1971. Mr. Trantum specializes in the airline and motor carrier industries. He spent nearly two months working on the Basic Report. This does not include the time Mr. Trantum spent reviewing data concerning the motor carrier industry, in which Overnite Transportation is engaged. The Basic Report contains Mr. Trantum's in-depth analysis concerning long-term and recent developments at Overnite Transportation and his projections and conclusions based upon such analysis.

13. The Special Report concerning Monsanto Company was prepared by W. D. Williams. Mr. Williams spent approximately eight days working on the Special Report. This does not include the time Mr. Williams spent reviewing data concerning the chemical industry in general and Monsanto Company in particular. The Special Report contains Mr. Williams' in-depth analysis concerning long-term and recent developments at Monsanto Company and his projections and conclusions based upon such analysis.

14. The Special Report concerning Eastman Kodak and Polaroid Corporation was prepared by Roy D. Burry who has functioned as a securities analyst at Wainwright since 1968. He specializes in the photographic industry among others and is a C.F.A. He spent approximately two days working on the Special Report. This does not include the time Mr. Burry spent reviewing data concern-

ing the photographic industry or the time he spent working with the consultants retained by Wainwright to obtain access to technical expertise and laboratory facilities, before he began to prepare the Special Report. The Special Report contains Mr. Burry's analysis and evaluation of the relative merits of certain Eastman Kodak and Polaroid Corporation cameras and film lines. As indicated in the first paragraph on the first page of the Special Report, Wainwright has begun to implement a program to evaluate the emerging competition in the instant photographic market. Wainwright anticipates that such an evaluation will cost it more than $15,000 annually.

15. The Basic Report concerning C.I.T. Financial Corporation was prepared by Andrew C. Halvorsen who has been employed as a securities analyst by Wainwright since 1972. He spent approximately two months working on the Basic Report. This does not include the time Mr. Halvorsen spent reviewing data concerning the finance industry in which C.I.T. Financial Corporation is engaged. The Basic Report contains Mr. Halvorsen's in-depth analysis concerning long-term and recent developments at C.I.T. Financial Corporation and his projections and conclusions based upon such analysis.

16. Abstracts of the foregoing Research Reports were published by *The Wall Street Transcript ("The Transcript")* without Wainwright's consent. The damage to Wainwright's goodwill caused by the publication of these abstracts is incalculable. The Research Reports are, in my opinion, the reason Wainwright is able to obtain and keep its institutional clients, which use the Research Reports as fundamental input in their investment decision making process. Indeed, for the past two years, Wainright has had the largest number of securities analysts rated as outstanding by *Institutional Investor* magazine, the leading trade publication in the institutional investment field.

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17. Wainwright does not give away its Research Reports. For *The Transcript* to publish abstracts of such reports impairs their value to Wainwright and to Wainwright's clients not least because by this means Wainwright's competitors in the brokerage business and potential institutional clients, as well as the general public, are provided with the fruits of Wainwright's research.

18. It may be impossible for us to determine how much brokerage business Wainwright lost because of the publication by *The Transcript* of abstracts of Wainwright's Research Reports. We have no idea whether any of our institutional clients gave business to other brokerage houses because they were upset about the publication of the abstracts in *The Transcript,* nor do we have any idea how many potential customers used the abstracts as the basis for investment decisions, but did not request Wainwright to act as their broker in connection with such investment decisions.

19. It should also be noted that the abstracts of Wainwright Research Reports published in *The Transcript* do not provide a complete and accurate statement of Wainwright's analysis. As the abstracts identify both Wainwright and the securities analyst who prepared the Research Report, omissions from and inaccuracies in such abstracts damage both Wainwright's and the securities analyst's reputations.

20. Wainwright copyrights its Research Reports to prevent their unauthorized use. Unfortunately, the copyright notice has not deterred Defendants from abstracting Wainwright Research Reports without Wainwright's consent and publishing such abstracts in *The Transcript.* Given Defendants' conduct, it does not appear that anything short of an injunction will stop them from infringing Wainwright's copyrights in its Research Reports.

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Conclusion

For the foregoing reasons, Wainwright respectfully requests that a temporary restraining order and preliminary injunction be issued prohibiting the Defendants during the pendency of this action from publishing, selling, marketing or otherwise disposing of any copies of any abstracts of copyrighted Wainwright Research Reports and from infringing in any manner Wainwright's copyrights in the Research Reports, copies of which are attached to the Complaint as Exhibits A, D, F, H and J.

No other application for the relief requested herein has been made.

(Sworn to by Robert L. Meyer July 9, 1976.)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

ROY L. REGOZIN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Cahill Gordon & Reindel, counsel for plaintiff H. C. Wainwright & Co. ("Wainwright").

2. I respectfully submit this affidavit in support of Wainwright's motions for a temporary restraining order and preliminary injunction against defendants Wall Street Transcript Corporation and Richard A. Holman ("Defendants").

3. An understanding of the background of this case and the context in which it arose is essential to an evaluation of the merits. On information and belief, Defendants publish a weekly publication entitled *The Wall Street Transcript* (*"The Transcript"*). Among the regular features of *The Transcript* is "Wall Street Roundup", which, upon information and belief, consists of abstracts of reports prepared by institutional research and other brokerage firms. The abstracts which are the subject of this action were published by *The Transcript* as part of the Wall Street Roundup.

4. Upon information and belief, *The Transcript* is engaged in the business of providing investment information derived from research reports prepared by institutional research and other brokerage firms and such information is published in Wall Street Roundup. Indeed, an adver-

tisement for *The Transcript* appearing on page 9 of the July 5, 1976 issue of *Barron's* proclaims this to be the case:

> "* * *
>
> ". . . now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, The Wall Street Transcript brings you a fast-reading, pinpointed account of heavyweight reports from the top institutional research firms.
>
> "Our Wall Street Roundup will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each year; and index every bit of it for you, immediately and continuously, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . .
>
> "* * *"

A copy of this advertisement is attached hereto as Exhibit A.

An advertisement for *The Transcript* printed on the inside of the front cover of the *1975 Final Cumulative Index* for *The Transcript* states in pertinent part:

> "Must reading for portfolio managers and investment managers is our Wall Street Roundup column—a weekly 50-minute tour that gives you the highlights of hundreds of hours of institutional reports."

A copy of this advertisement is attached hereto as Exhibit B.

An advertisement for *The Transcript* appearing on page 9 of the October 27, 1975 issue of *Barron's* states in pertinent part:

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> "WHAT leading investment houses across the country are saying to their big institutional clients —the big banks, insurance companies, funds, and important foreign clients.
>
> * * *
>
> "WHAT top professionals and money managers say about industries and the stocks within them in our famous Roundtables. (The Transcript itself gives no investment advice.)
>
> "WHAT the nation's well-known stockbrokers are saying to their customers."

A copy of this advertisement is attached hereto as Exhibit C.

5. When *The Transcript* published abstracts of Wainwright's Research Reports in May 1976, Robert L. Meyer, Director of Research for Wainwright, contacted Cahill Gordon & Reindel. Stephen A. Greene, Esq. of the firm Cahill Gordon & Reindel wrote to defendant Wall Street Transcript Corporation, Attention: Mr. Richard A. Holman, Publisher on May 27, 1976 protesting the publication by *The Transcript* of "unauthorized abstracts of research reports prepared and copyrighted by our client H. C. Wainwright & Co.". The letter was delivered by hand on May 27, 1976 to defendant Wall Street Transcript Corporation. The Research Reports which at that time had been abstracted were:

> (a) Special Report dated April 13, 1976 concerning FMC Corp., a copy of which is attached as Exhibit A to the Complaint herein, the abstract of which appeared on page 43,669 of the May 10, 1976 issue of *The Transcript*, a copy of which abstract is attached as Exhibit B to the Complaint;

(b) Basic Report dated April 27, 1976 concerning Overnite Transportation, a copy of which is attached as Exhibit D to the Complaint, the abstract of which appeared on page 43,689 of the May 17, 1976 issue of *The Transcript*, a copy of which abstract is attached as Exhibit E to the Complaint; and

(c) Special Report dated April 28, 1976 concerning Monsanto Company, a copy of which is attached as Exhibit F to the Complaint, the abstract of which appeared on page 43,789 of the May 24, 1976 issue of *The Transcript*, a copy of which abstract is attached as Exhibit G to the Complaint.

A copy of Mr. Greene's May 27, 1976 letter is attached hereto as Exhibit D.

6. The May 31, 1976 issue of *The Transcript* contained a fourth abstract of a copyrighted Wainwright Research Report, namely, the Special Report dated April 30, 1976 concerning Eastman Kodak and Polaroid Corporation, a copy of which is attached as Exhibit H to the Complaint herein, the abstract of which appeared on page 43,811 of the May 31, 1976 issue of *The Transcript*, a copy of which abstract is attached as Exhibit I to the Complaint.

7. By letter dated June 1, 1976 Samuel N. Greenspoon, Esq. of the firm Eaton, Van Winkle & Greenspoon, advised Mr. Greene that *The Transcript* had forwarded his May 27, 1976 letter to the Eaton firm for reply. Mr. Greenspoon stated that he had "great difficulty in finding any remote resemblance between the digest and the Wainright reports" and offered to discuss any suggestions for avoiding disputes. A copy of Mr. Greenspoon's letter dated June 1, 1976 to Mr. Greene is attached hereto as Exhibit E.

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8. I spoke with Mr. Greenspoon by telephone on June 5, 1976, advised him that in fact the abstracts referred to in Mr. Greene's letter dated May 27, 1976 (Exhibit D hereto), which were published in *The Transcript,* consisted entirely of verbatim extracts from, and paraphrases of, portions of the reports, as indicated in Mr. Greene's letter. Mr. Greenspoon indicated that the earliest he could meet with us was Wednesday, June 9, 1976.

9. On June 9, 1976 I met with Mr. Greenspoon in his office. We discussed the abstract of the Basic Report concerning Overnite Transportation (Exhibit D to the Complaint), which abstract was published in the May 17, 1976 issue of *The Transcript* (Exhibit E to the Complaint), and I pointed out to him the verbatim quotations and paraphrasing contained in the abstract. Mr. Greenspoon indicated that he would draft a "digest" of the Basic Report concerning Overnite Transportation and send it to me for my comments.

10. By letter dated June 17, 1976 Mr. Greenspoon provided a "digest" of Wainwright's Basic Report concerning Overnite Transportation. A copy of Mr. Greenspoon's letter to me dated June 17, 1976 is attached hereto as Exhibit F.

11. On June 23, 1976 Mr. Greenspoon called to inquire whether we had reviewed his June 17, 1976 letter. I indicated that we had reviewed it, but had not yet discussed our views with Wainwright. I indicated that in our view the "digest" set forth in Mr. Greenspoon's letter dated June 17, 1976 was not acceptable because it summarized the report and revealed the results of Wainwright's analysis, that is, Wainwright's conclusions concerning Overnite Transportation. Mr. Greenspoon advised me that he had drafted a summary of a recent Wainwright report concerning C.I.T. Financial Corporation and I was left with

the distinct impression that such summary would be published by *The Transcript*.

12. By letter dated June 24, 1976 addressed to Mr. Greenspoon and delivered to his office by hand on that date, a signed copy of which was delivered by hand on June 24, 1976 to the offices of defendants Wall Street Transcript Corporation and Mr. Holman, I confirmed my advice to Mr. Greenspoon by telephone on June 23, 1976 that "it is our position that any summary published in *The Wall Street Transcript* of a research report prepared and copyrighted by H. C. Wainwright & Co. constitutes an infringement of Wainwright's copyright therein". My June 24, 1976 letter also gave express notice pursuant to Section 101(b) of the Copyright Act (17 U.S.C. §101 [b]) that

> "any summary of the kind set forth in your letter to us dated June 17, 1976 and, in particular, the summary of the Wainwright Report concerning C.I.T. Financial Corporation which you described to me during our telephone conversation on June 23, 1976, would constitute an infringement of H. C. Wainwright & Co.'s copyright therein."

A copy of my letter dated June 24, 1976 to Mr. Greenspoon is attached hereto as Exhibit G.

13. By letter dated June 25, 1976 Mr. Greenspoon responded to my letter dated June 24, 1976, stating in part that the "digest" of Wainwright's report concerning C.I.T. Financial Corporation "will state the conclusions or ideas expressed, but in language that neither compasses the artistic expression or words of the author". A copy of Mr. Greenspoon's letter to me dated June 25, 1976 is attached hereto as Exhibit H.

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

14. By letter dated June 30, 1976 addressed to Mr. Greenspoon I reviewed and restated in detail our position and the reasons for it, citing authorities which support our position. A copy of my letter dated June 30, 1976 to Mr. Greenspoon is attached hereto as Exhibit I.

15. By letter dated July 1, 1976 Mr. Greenspoon responded to my letter dated June 30, 1976. He concluded as follows:

> "I stand ready to cooperate with you in an effort to work out a reasonable format.
> **"Please advise."**

A copy of Mr. Greenspoon's letter to me dated July 1, 1976 is attached hereto as Exhibit J.

16. On July 6, 1976 I was drafting a response to Mr. Greenspoon's July 1, 1976 letter when I was advised by Mr. Meyer of Wainwright that the July 5, 1976 issue of *The Transcript* contained an abstract of Wainwright's Basic Report dated June 15, 1976 concerning C.I.T. Financial Corporation, a copy of which is attached as Exhibit J to the Complaint, the abstract of which appeared on page 44,163 of the July 5, 1976 issue, a copy of which abstract is attached as Exhibit K to the Complaint. In view of this development, I did not complete the draft of my response to Mr. Greenspoon's July 1, 1976 letter.

17. From the foregoing it is apparent that *The Transcript* will not be dissuaded from publishing unauthorized abstracts of Wainwright's copyrighted Research Reports.

18. There can be no doubt that the source of each of the abstracts referred to above published in *The Transcript* is the Wainwright Research Report which was abstracted. On information and belief, Defendants did not do any research relating to the matters covered in the Wainwright Research Reports; they merely quoted from, paraphrased

and/or rewrote such reports to provide information concerning their contents to readers of *The Transcript* for their use in making investment decisions.

19. Set forth below in the left hand column are statements contained in the abstract published in *The Transcript* of Wainwright's Special Report concerning FMC Corp. and in the right hand column corresponding statements from the Special Report:

Abstract	*Special Report*
". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."	"The first of the 'surprises' alluded to above that strengthen 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p. 1)
"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."	"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)
"His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975."	"Earnings (Years ending Dec. 31) . . . Actual 1975 . $3.24 per share (b) Estimated 1976 . $3.75 per share (c) • • • "(b) including LIFO profit of 20¢ per share and 12¢ per share benefit of change in pension funding assumptions.

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Abstract	*Special Report*
	"(c) after possible further tanker losses provision of 25¢ per share." (p. 1)
". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."	". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . ." (p. 4)
". . . the company could wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings."	". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings." (p. 6)
". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."	". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)

As is readily apparent from the foregoing, the abstract is lifted directly from the Special Report. It is worthy of note that quotation marks are not used to set off portions of the abstract which are verbatim extracts from the Special Report.

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20. Set forth below in the left hand column are statements contained in the abstract published in *The Transcript* of Wainwright's Basic Report concerning Overnite Transportation and in the right hand column corresponding statements from the Basic Report:

Abstract	*Basic Report*
". . . stronger earnings pattern at Overnite Transportation Co. (22) through 1976 and 1977, because of such factors as revenue improvement, cost cutting and the planned development of new business between Ohio and the Southeast. . . ."	"Since the fall of 1975, however, *cost-cutting measures* combined with *strengthening revenues* reversed the earnings pattern, and it appears that this favorable trend will continue throughout 1976. . . . Furthermore, with the recent additions of route authority *and the planned development of new business between Ohio and the Southeast*, the carrier should be positioned to extend the favorable earnings trend into 1977." (emphasis added) (p. 1)
"Trantum estimates that Overnite Transportation will earn $3 a share this year, compared with $2.03 in 1975 and $2.78 in 1974."	"Earnings (Years ending Dec. 31) Actual 1974 . $2.78 per share Actual 1975 . $2.03 per share Estimated 1976 . $3.00 per share" (p. 1)

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Abstract	*Basic Report*
"Earnings were down in 1975, he says, because the carrier could not cut operating expenses enough to make up for a dropoff in revenues related to the recession."	"Last year, Overnite Transportation experienced a sharp earnings reversal because the carrier was unable to reduce operating expenses sufficiently to compensate for the recession-related dropoff in revenue." (p. 1)
"The company had kept up a no-layoff policy in the past, he says, while paying low wages to non-union employees. When Overnite Transportation tried to maintain the no-layoff policy last year, he says, profits were reduced to a point where some layoffs became essential."	"While Overnite benefits from paying low wage rates to non-union employees, the company has historically maintained a no-layoff policy for regular full-time employees so workers could depend on a 40-hour work week. However, attempts to maintain this policy throughout the downturn curtailed profits to the point where employee layoffs became absolutely necessary." (p. 1)
"Earnings began to improve last fall, Trantum says, because of stronger revenues and measures to reduce costs."	"Since the fall of 1975, however, cost-cutting measures combined with strengthening revenues reversed the earnings pattern. . . ." (p. 1)

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Abstract	*Basic Report*
"Productivity gains are beging [*sic*] realized, he believes, and a favorable earnings trend should be maintained this year, with additional gains in 1977 as a result of recent additions to route authority and plans for developing new business between Ohio and the Southeast."	"Productivity gains are finally being realized. . . . Furthermore, with the recent additions of route authority and the planned development of new business between Ohio and the Southeast, the carrier should be positioned to extend the favorable earnings trend into 1977." (p. 1)
"As for the longer term, Trantum says management must take several steps to improve its uneven earnings performance since 1971. He says it must expand its operating authority to cut its dependence on the Southeast, put greater stress on sales and refine and tighten its system of revenue and expense controls."	"Before Overnite can be expected to significantly improve on uneven earnings performance since 1971, this analyst believes it necessary for management to take several steps: (1) expand operating authority to reduce dependence on the Southeast, (2) place greater emphasis on sales, and (3) refine and tighten the company system of revenue and expense controls." (p. 1)
"Trantum says progress is apparently taking place in all three areas, but he says it's too early to define the effects of the company's actions on long-term prospects."	"While progress is apparently being made in all three areas, it is still too early to precisely define the effects of these actions on the long-term outlook." (p. 1)

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As is readily apparent from the foregoing, the abstract is taken directly from the Commentary which is set forth on the first page of the 26-page Basic Report. Again I note that quotation marks are not used to set off portions of the abstract which are verbatim extracts from the Basic Report.

21. Set forth below in the left hand column are statements contained in the abstract published in *The Transcript* of Wainwright's Special Report concerning Monsanto Company and in the right hand column corresponding statements from the Special Report:

Abstract	*Special Report*
". . . W. D. Williams writes that he has increased his full year 1976 estimate for Monsanto Company ($92) from $10.00 per share (primary) to $11.80, due to greater strength in the plastics and fibers area than was previously anticipated."	". . . the writer has increased his full year 1976 estimate from $10.00 per share (primary) to $11.80." (p. 1) ". . . stronger than originally anticipated comparisons in non-agricultural lines gave Monsanto earnings of $4.40 per share in its seasonal peak first quarter, . . . Because the source of the variance in profits for this period lies mainly in the plastics and fibers areas . . . the implications for year-to-year profit increases in subsequent quarters also appear more favorable than had been forecasted earlier." (p. 1)

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Abstract	*Special Report*
"The new projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half."	"The projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half. . . ." (p. 1)
". . . the Monsanto Agricultural Products Company seems likely, in the analyst's opinion, to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half."	". . . the Agricultural Company seems likely to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half." (p. 2)
"Overall ag earnings should drop at least modestly—and perhaps by as much as 30¢-40¢ per share—from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries."	". . . overall ag earnings should drop at least modestly—and *perhaps* by as much as 30¢-40¢ per share—from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries." (p. 3)
"Mr. Williams believes it is possible that 1977 EPS could fall in the $10.50-13.25 range. . . ."	". . . it seems possible that overall 1977 earnings could fall in the range of $10.50-$13.25 per share." (p. 10)

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Abstract	*Special Report*
". . . with the most potent influence on company results being the trend and level of economic activity and its impact on the non-ag sectors of the business."	". . . it is likely that a much more potent influence on company results in 1977 will be the trend and level of economic activity and its impact on the non-ag sectors of the business." (p. 1)
". . . a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major source of Monsanto's earnings."	". . . a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major soure of Monsanto's earnings." (p. 1)
"Depending on the set of assumptions used, Monsanto's 1977 ag results might fall in a range of $4.75-5.00 per share or in the $4.00-4.25 per share range (versus the 1976 estimate of $4.35)."	"Assuming . . . Monsanto's 1977 ag results would fall in a range of $4.75-$5.00 per share, versus the 1976 estimate of $4.35." (p. 9) "Adopting a more pessimistic scenario . . . Ag earnings of $4.00-$4.25 per share would follow from the premise. . . ." (p. 10)

As is readily apparent from the foregoing, the abstract is lifted from the Special Report. I again note that quotation marks are not used to set off portions of the abstract which are verbatim extracts from the Special Report.

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

22. Set forth below in the left hand column are statements contained in the abstract published in *The Transcript* of Wainwright's Special Report concerning Eastman Kodak and Polaroid Corporation and in the right hand column corresponding statements from the Special Report:

Abstract	*Special Report*
". . . Roy D. Burry presents a technical evaluation of the relative merits of the Kodak and Polaroid camera and film lines."	"The initial phase of our program . . . consists of a technical evaluation of the relative merits of the Eastman Kodak and Polaroid camera and film lines." (p. 1)
"Burry says the firm has retained outside consultants for this purpose."	". . . H. C. Wainwright & Co. has retained outside consultants. . . ." (p. 1)
"His initial equipment evaluation is based on a comparison between Kodak's EK6 and Polaroid's Pronto."	". . . initial equipment evaluation is based entirely on these two models [EK6 and Pronto]." (p. 1)
"Physically, the Pronto is superior due to lighter weight and less bulkiness."	"In terms of physical characteristics, the Polaroid Pronto is generally superior to the EK6. The Pronto is a substantially lighter 16 ounces . . . the Pronto is also less bulky." (p. 1)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Special Report*
". . . holding methods differ, with the Pronto method superior in terms of resulting picture quality due to less camera motion."	"The holding methods for the two cameras differ considerably. The Pronto method is technically superior in terms of resulting picture quality, because it produces less camera motion. . . ."
"The EK6 shutter is faster, with a top speed of 1/300 second, while Pronto's best speed is 1/25 second."	". . . Kodak shutter is significantly faster, as indicated below (p. 2)
	"Shutter Speed Camera — Shutter Speed Range EK6 — 1/300-1/20 second Pronto — 1/125-1 second."
". . . this speed, made possible by Kodak's faster film, is an important aspect of the product design, and offset the disadvantage of the holding method."	"*The faster EK6 shutter is made possible by the faster speed of the Kodak PR-10 film and represents an important aspect of the EK product design.* The higher incidence of camera movement (resulting from the less stable *holding technique*) and the use of a textured print finish (discussed later in this report) both tend to lower sharpness and definition of the PR-10 image; the faster

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Special Report*
	speed of the EK6 shutter *partially offsets* these *disadvantages* by reducing the impact of camera and subject movement." (emphasis added) (p. 2)
". . . the EK6 offers a simple mechanical means of estimating distance important to achieving good focus."	"Eastman Kodak has taken an important step toward solving one of the major problems of the self-developing market—the seeming inability of the photographer to accurately focus his instant camera for distance. . . . the EK6 contains an adjustable circle that exactly encompasses one adult subject's head—thus offering a convenient and simple focusing mechanism. . . ." (p. 2)
". . . Pronto has a wider f/stop range, giving it a wider depth of field."	". . . the Pronto f/stop range is much wider . . . the lens focal length of the Polaroid unit is shorter. . . . These two features give the Pronto a longer depth-of-field than the comparable Kodak unit. . . ." (pp. 2-3)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Special Report*
"Flash range is greater for the Pronto (3-12 ft.) versus the EK6's 4-10 ft."	"The distance range for indoor flash pictures is considerably greater for the Pronto, 3-12 feet, compared with 4-10 feet for the EK6." (p. 3)
"The Kodak film is rectangular and has slightly less total area than the square Polaroid film."	"The print developed by the Kodak PR-10 film is rectangular, while that of Polaroid SX-70 film is square. As shown below, the SX-70 image is slightly larger." (p. 3)
"The Kodak film is faster, and both have about the same development time (8-10 minutes)."	"The PR-10 film is 50% faster than the SX-70 film. . . . Development time in both instances is about the same, taking 8-10 minutes for full development." (p. 3)
"Burry explains the differences in color rendition, with Kodak providing a softer quality with the greens and blues more accurate, while Polaroid gives better reds and oranges and better contrast."	"With regard to color rendition, the 'hotter' segment of the color spectrum-principally—reds, yellows and pinks—are more accurately and attractively portrayed in the SX-70 image. . . . The PR-10 image, however, depicts the "softer" greens and blues more accurately . . . the PR-10 image lacks the contrast and sharpness of the SX-70 picture." (p. 4)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Special Report*
"Burry concludes that neither Kodak nor Polaroid has established an overall or overpowering technical advantage over the other."	". . . it is this analyst's opinion that *neither Kodak or Polaroid has yet established an overall or overpowering technical advantage.*" (p. 5)
". . .many questions remain unanswered . . . ."	". . . the following important questions remain unanswered." (p. 5)

As is readily apparent from the foregoing, the abstract is lifted from the Special Report. I again note that qu tation marks are not used to set off portions of the abstract which are verbatim extracts from the Special Report.

23. Set forth below in the left hand column are statements contained in the abstract published in *The Transcript* of Wainwright's Basic Report concerning C.I.T. Financial Corporation and in the right hand column corresponding statements from the Basic Report:

Abstract	*Basic Report*
"Among the pluses, Halvorsen listed the earnings benefits derived from lower short-term interest rates. . . .	"As has been the case in the past, the strongest annual earnings gains are likely to come during periods of relatively low or declining short term interest rates." (p. 2)
. . . and CIT's finance, manufacturing and merchandising, and life and health insurance divisions."	". . . the excellent Finance, Manufacturing and Merchandising, and Life and Health Insurance earnings gains." (p. 1)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Basic Report*
"The minuses, according to Halvorsen, were a somewhat disastrous year for CIT's banking business	"*Bank Earnings Collapse.*" (p. 4)
. . . and property and casualty insurance business."	"*Net Loss in Property and Casualty Operations. . . .*" (p. 5)
"He believes that short-term interest rates will rise sharply in 1976. . . ."	". . . short-term interest rates may soon trend significantly higher. . . ." (p. 1)
"He points out that because of the short-term interest rate decline in 1975, the finance division's earnings in that year increased about 37% although it did not do well in increasing its loan portfolio."	"*Lower Borrowing Costs Lift Finance Profits.* Chiefly reflecting the sharp decline in short-term interest rates, Finance Division earnings in 1975 surged 37%. . . . Loan growth was not particularly impressive. . . ." (p. 3)
"On the other hand the Bank's profits declined to the point where without tax exempt income it would have shown a loss. . . ."	". . . the bank was unprofitable on a "financial statement" income tax basis. However, NBNA is included in C.I.T.'s consolidated tax return, so that after allocated tax recoveries of $3.7 million, the bank's net income totalled $14.1 million." (p. 5)

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

Abstract	*Basic Report*
"Insofar as the insurance business of CIT is concerned, the gains of the life and health division were more than offset by the losses of other insurance divisions with the end result that the insurance business profits plummeted some 12%. . . ."	". . . a moderate 8% gain in earnings of the life and health company was outweighed by a dismal performance by the much smaller property and casualty company, so that total divisional net income fell 12%." (p. 5)

As is readily apparent from the foregoing, the abstract is lifted from the first six pages of the 41-page Basic Report. The absence of verbatim extracts from the Basic Report is inconsequential. The fact remains that the sole source for the abstract was the Wainwright report.

24. It is clear from the foregoing comparisons that each of the abstracts published in *The Transcript* infringed Wainwright's copyright in the report which was abstracted.

25. It is clear from the matters set forth in the affidavit of Mr. Robert L. Meyer that Wainwright will suffer irreparable harm if a preliminary injunction is not issued. Wainwright's goodwill and its reputation are at stake.

26. While the Research Reports represent Wainwright's lifeblood, they represent a drop in a very large bucket with regard to the number of institutional research reports to which *The Transcript* apparently has access. In spite of this, the likelihood that Defendants would continue to publish abstracts of Wainwright's Research Reports absent an injunction is great.

Affidavit of Roy L. Regozin, Sworn to July 9, 1976, in Support of Motion for Temporary Injunction

27. Furthermore, as demonstrated in Point III of Wainwright's Brief, upon a prima facie showing of copyright infringement, a copyright holder is entitled to a preliminary injunction without a detailed showing of danger of irreparable harm.

CONLUSION

For the foregoing reasons, plaintiff respectfully requests that a temporary restraining order and preliminary injunction be issued prohibiting the Defendants during the pendency of this action from publishing, selling, marketing or otherwise disposing of any copies of any abstracts of copyrighted Wainwright Research Reports and from infringing in any manner Wainwright's copyrights in the Research Reports, copies of which are attached to the Complaint as Exhibits A, D, F, H and J. No other application for the relief requested herein has been made.

(Sworn to by Roy L. Regozin, July 9, 1976.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

Barron's
July 5, 1976
Page

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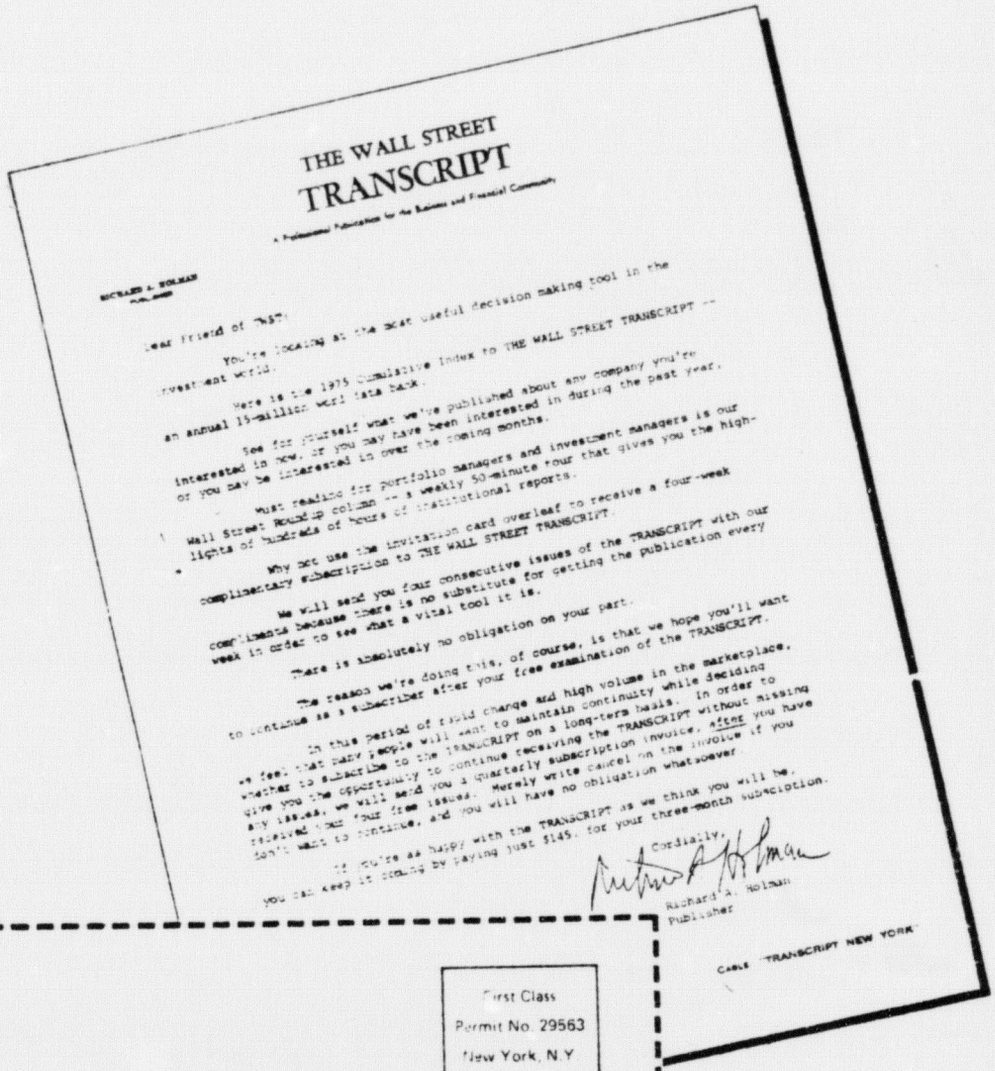

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Barron's
October 27, 1975
Page 9

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RADIO AND CABLE ADDRESSES
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May 27, 1976

Dear Mr. Holman:

The Wall Street Transcript recently published three unauthorized abstracts of research reports prepared and copyrighted by our client H. C. Wainwright & Co., namely, the Special Report dated April 13, 1976 concerning FMC Corp., the abstract of which appears on page 43,669 of the May 10, 1976 issue of The Wall Street Transcript, the Basic Report dated April 27, 1976 concerning Overnite Transportation, the abstract of which appears on page 43,689 of the May 17, 1976 issue of The Wall Street Transcript, and the Special Report dated April 28, 1976 concerning Monsanto Company, the abstract of which appears on page 43,789 of the May 24, 1976 issue of The Wall Street Transcript.

The abstracts consist in their entirety of verbatim extracts from, and paraphrases of, portions of the reports. It appears to us that the abstracts clearly infringe the copyrights of H. C. Wainwright & Co.

As you probably already know, the H. C. Wainwright & Co. research reports involve a great deal of time, effort and expense to prepare and are distributed with the expectation that persons who use them in their investment decisions might ask H. C. Wainwright & Co. to act as their broker. Publishing abstracts of such reports impairs their value to H. C. Wainwright & Co. and unjustly enriches The Wall Street Transcript.

FXHIBIT D, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

We are writing with the hope that litigation will not be necessary, and that satisfactory arrangements can be made to assure H. C. Wainwright & Co. that similar incidents will not occur in the future. However, if we do not receive a satisfactory response from you or your attorneys in this regard by June 4, 1976, we will recommend that H. C. Wainwright & Co. pursue its legal remedies.

Very truly yours,

Stephen A. Greene

Wall Street Transcript Corporation
120 Wall Street
New York, New York 10005

Attention: Mr. Richard A. Holman,
Publisher

BY HAND

EXHIBIT E, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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JOHN A. MAHER, JR.
COUNSEL

TELEPHONE: (212) 867-0606
CABLE: EATTORNEY

June 1, 1976

Stephen A. Greene, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, N.Y. 10005

Dear Mr. Greene:-

Your letter to the Wall Street Transcript ("Transcript") dated May 27, 1976 has been forwarded to this office for reply. I have also reviewed Wainright's reports referred to in your letter and the Transcript's digests thereof.

I have grave difficulty in finding any remote resemblance between the digest and the Wainright reports. The Basic Report, e.g. embraces 26 pages, while the Transcript digest covers about 4 inches of type. Neither Wainright's words nor artistic construction appear in the Transcript. I really believe that the Transcript's digests are fair use of Wainright's reports.

It is also highly questionable if Wainright is entitled to copyright this material, since as I understand it the Reports are not offered for sale and thus copyright may not be obtainable under Section 12.

However, we prefer to dispose of all matters amicably. Certainly Wainright and the Transcript are not in competition and Wainright has not been damaged.

Certainly the Transcript makes every reasonable effort to avoid plagiarism. We should be pleased to discuss with you any suggestions you may have to avoid disputes.

Sincerely yours,

Samuel N. Greenspoon

SNG/fd
cc: Mr. Richard A. Holman

EXHIBIT F, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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TELEPHONE: (212) 867-0606
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June 17, 1976

Cahill, Gordon & Reindel, Esqs.
80 Pine Street
New York, N.Y. 10005

Attention: Mr. Regozin

Dear Mr. Regozin:-

I am sorry that I did not get to you what I propose would be a fair comment on the Wainwright report dated April 27, 1976; that is the report we discussed in my office. I suggest something along the following lines:

> "Under date of April 27, 1976 H.C. Wainwright & Co. issued a report signed by Thomas A. Tantrum concerning Overnite Transportation Co. (OTC - $22). According to the report Overnite did not do well last year, but has shown improvement since the fall of 1975. Although Tantrum indicates that Overnite should show some continued improvement nonetheless he opines that various problems preclude any firm prognosis."

I would appreciate it if you would advise me promptly as to whether or not such a digest would be within what you consider a fair method of handling the same.

Sincerely,

SNG/fd

EXHIBIT G, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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June 24, 1976

Dear Mr. Greenspoon:

This is to confirm that, as I indicated when we spoke by telephone yesterday, it is our position that any summary published in The Wall Street Transcript of a research report prepared and copyrighted by H. C. Wainwright & Co. constitutes an infringement of Wainwright's copyright therein. Such summary would at most constitute a derivative work for which consent of the proprietor of the copyright in the underlying work (i.e., the Wainwright Report) must be obtained. As you know, H. C. Wainwright & Co. has not consented to such use of its reports by The Wall Street Transcript.

You indicated during our telephone conversation that you had drafted a summary of a Wainwright Report concerning C.I.T. Financial Corporation. From your description, it would appear that the summary reveals the results of H. C. Wainwright & Co.'s analysis of C.I.T. Financial Corporation and traces the division by division analysis contained in the report. Such a summary would clearly constitute an infringement of Wainwright's copyright.

Pursuant to Section 101(b) of the Copyright Act (17 U.S.C. §101(b)) we hereby give notice that any

EXHIBIT G, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

summary of the kind set forth in your letter to us dated June 17, 1976 and, in particular, the summary of the Wainwright Report concerning C.I.T. Financial Corporation which you described to me during our telephone conversation on June 23, 1976, would constitute an infringement of H. C. Wainwright & Co.'s copyright therein.

Very truly yours,

(S)

Roy L. Regozin

Samuel N. Greenspoon, Esq.
Eaton, Van Winkle & Greenspoon
600 Third Avenue
New York, New York 10016

BY HAND

cc: Mr. Richard A. Holman

EXHIBIT H, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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TELEPHONE: (212) 867-0606
CABLE: EATTORNEY

June 25, 1976

Roy L. Regozin, Esq.
Cahill Gordon & Reindel
Eighty Pine Street
New York, New York 10005

Dear Mr. Regozin:-

I have received your letter dated June 24, 1976, and I do not believe that you have correctly characterized what I told you about the CIT report.

What I told you is that the digest will state the conclusions or ideas expressed, but in language that neither compasses the artistic expression or words of the author. Thus the CIT article mentions various factors regarding CIT some of which are favorable and some unfavorable.

All of that would be digested by simply stating that Wainwright has issued a report about CIT in which it concludes that CIT's prospects are both negative and positive, and the positive may outweigh the negative.

You have made it clear to me that Wainwright objects to publication of its ideas, its opinions, its theories (albeit without use of Wainwright's artistic expression or words). I believe that your words were that Wainwright objects to the fact that it purportedly expends sums to do the basic research from which the ideas, opinions, etc. set forth in its report are derived. I am sure that you know that ideas, opinions and theories expressed in the copyrighted material are not copyrightable.

EXHIBIT H, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

In any event I am sure that you also recognize that where, as here, neither the artistic expression nor the words are used, there is fair use of copyrighted material and no consent of the copyright holder is required. See e.g. Sheldon v. M.G.M., 81 F. 2d 49.

In view of the rigid position which you and Wainwright are taking, to wit, that virtually any reference to any idea or opinion expressed in a Wainwright report constitutes an infringement of its copyright - I can only assume that no matter what the Transcript does Wainwright will sue. I think the threat of suit is clearly implicit if not express in everything which has occurred to this date irrespective of the complete lack of merit in Wainwright's position.

I must advise you that I consider this an attempt by Wainwright to seriously impede the free flow of ideas and opinions and thus constitutes an infringement upon the notions of free press which have guided this nation for some two centuries. Moreover, I would consider any attempt by Wainwright to claim copyright infringement because ideas or opinions are published, as malicious and thus any action brought thereon by Wainwright as malicious prosecution.

We have made every effort to reconcile Wainwright's interests, if any, with the public's right to know but apparently to no avail. Wainwright is not even in the business of selling its reports and cannot claim any loss of profits from impairing any sale of its reports since it makes no sales. I suggest that Wainwright alter its stance and recognize that copyright is no protection to its alleged ideas and opinions and that its better course of action is to cooperate with the Transcript in the same manner as the Transcript is prepared to cooperate with Wainwright.

Please advise.

Sincerely,

Samuel N Dennison

SNG/fd

EXHIBIT I, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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RADIO AND CABLE ADDRESSES
"COTTOFRANK NEWYORK"
COTTOFRANK WASHINGTON"
"COTTOFRANK PARIS"

June 30, 1976

Dear Mr. Greenspoon:

It appears from your letter dated June 25, 1976 that the crux of whatever disagreement exists between us relates to the applicability and scope of the defense of fair use.

We have not taken the position you ascribe to us, namely "that virtually any reference to any idea or opinion expressed in a Wainwright report constitutes an infringement of its copyright". We have objected to the publication in The Wall Street Transcript of summaries of H. C. Wainwright & Co.'s reports which reveal Wainwright's conclusions and analysis set forth in such reports, regardless of the manner in which such summaries are written. We have also advised you that such summaries would infringe Wainwright's copyrights in such reports.

The sole and undisputed source for the summaries at issue is H. C. Wainwright & Co.'s research reports. These summaries do nothing more than restate what the reports state. The only purpose of the summaries is to provide information concerning the contents of H. C. Wainwright & Co.'s reports to readers of The Wall Street Transcript for their use in making investment decisions.

EXHIBIT I, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

Under these circumstances the defense of fair use simply does not apply. Section 7 of the Copyright Act (17 U.S.C. § 7) provides that "abridgments . . . or other versions" of a copyrighted work must be produced with the consent of the proprietor of the copyright in the underlying work. The H. C. Wainwright & Co. reports are copyrighted and provide the only source for the summaries. Clearly, H. C. Wainwright & Co.'s consent is required if the summaries are not to infringe Wainwright's copyrights.

In Houghton Mifflin Co. v. Noram Publishing Co., 28 F.Supp. 676 (S.D.N.Y. 1939) the court granted a motion for a temporary injunction to restrain copyright infringement by a condensed version of a copyrighted book. In the case you cite in your June 25, 1976 letter, Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), the plaintiffs claimed that defendants' motion picture infringed their copyrighted play. Defendants asserted "they did not use the play in any way to produce the picture". The Circuit Court of Appeals held that "substantial parts were lifted" and awarded an injunction, damages and attorney's fees to the plaintifffs. The point is that The Wall Street Transcript's summaries are lifted in their entirety from H. C. Wainwright & Co.'s reports. There is no other source.

The copyright law protects the results of research. See, e.g., Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); and College Entrance Book Co. v. Amsco Book Co., 119 F.2d 874 (2d Cir. 1941). These cases hold that the results of research cannot be copied with impunity. In Huie v. National Broadcasting Co., 184 F.Supp. 198 (S.D.N.Y. 1960), the court stated:

> ". . . if an historian had published a history of the negotiations between the Soviet Union and the United States with respect to nuclear explosions and copyrighted it, it would be an infringement of the copyright for another historian to publish a history re-written from the first historian's book without any independent research." 184 F.Supp. at 200

EXHIBIT I, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F.Supp. 302 (E.D. Pa. 1938), holds that any copying which is not "so unsubstantial as to be de minimis" constitutes infringement. It cannot be seriously contended that copying H. C. Wainwright & Co.'s conclusions from a research report would be de minimis.

The fact that the H. C. Wainwright & Co. research reports involve a great deal of time, effort, skill and expense to prepare also demonstrates the unfairness to Wainwright of the summaries published by The Wall Street Transcript which you have advised me is distributed to brokers as well as to the investing public. The Wall Street Transcript, in short, is providing the fruits of Wainwright's research to Wainwright's competitors as well as to persons who would otherwise have to obtain such information from H. C. Wainwright & Co. itself. This constitutes unauthorized appropriation and unfair competition. See Bond Buyer v. Dealers Digest Publishing Co., 25 App. Div. 2d 158, 267 N.Y.S. 2d 944 (1st Dep't. 1966).

In view of the fact that the institutional research services provided by H. C. Wainwright & Co. generate substantially all of its revenues and profits, it is obvious that Wainwright does sell its research reports for "soft" dollars, that is, brokerage commissions. H. C. Wainwright & Co. also sells its reports for "hard" dollars (cash). Publishing summaries of such reports impairs their value to H. C. Wainwright & Co.

We need not belabor this point because the question of damages is a red herring. Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)) provides for the recovery of statutory damages for infringement in lieu of actual damages and profits. The Supreme Court in Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202 (1931), held that statutory damages must be awarded for infringement if actual damages are not shown. As you probably already know, under Section 101(b) the scheduled amount for infringing periodicals is $1 per copy.

We have made every effort, as is clear from our letters, to avoid litigation, and have spelled out in some detail our position and the reasons for it.

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EXHIBIT I, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

H. C. Wainwright & Co. intends nothing more than to protect its interests in its copyrighted research reports. It has exercised great restraint in not immediately commencing an action for infringement with respect to the summaries identified in our letter dated May 27, 1976 to Mr. Holman, which consist in their entirety of verbatim extracts from, and paraphrases of, portions of Wainwright reports.

I trust that our position is clear.

Very truly yours,

/s/

Roy L. Regozin

Samuel N. Greenspoon, Esq.
Eaton, Van Winkle & Greenspoon
600 Third Avenue
New York, New York 10016

BY HAND

EXHIBIT J, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN.

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July 1, 1976

Roy L. Regozin, Esq.
Cahill, Gordon & Reindel
Eighty Pine Street
New York, N.Y. 10005

Dear Mr. Regozin:-

I have received your extremely interesting and informative letter dated June 30, 1976. However, I do not believe that what we are talking about remotely resembles anything which was held to be an infringement or unfair competition in the cases to which you refer in your letter.

For example, I do not think that Section 7 of the Act has anything to do with the question of infringement. I believe that Section 7 relates to obtaining a new copyright with respect to material which had previously been copyrighted. I assume that unless the conditions of Section 7 are met, an abridgement of previously copyrighted matter cannot be copyrighted without the consent of the proprietor of the copyright of the original matter.

I do not think that the Houghton case is of any relevance here inasmuch as in that case the two parties were in competition selling the same book and the infringing book was practically word for word with the copyrighted version.

The Judge said that he had not read both books in their entirety but the extracts from which he quoted showed that they were remarkably similar.

EXHIBIT J, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

In the Toksvig case, the infringing book contained at least 24 specific passages from the copyrighted book; apparently quoted word for word. There the Judge said that it has generally been construed that an infringement consists in copying some substantial or material part of the work and it is sufficient if a material and substantial part shall have been copied even though it be but a small part of the whole. As I have made clear the Transcript will not copy any part of the report much less a substantial or material part.

The College Entrance Book case went off on the issue of whether or not the copyrighted book was the source of the material contained in the infringing book. The infringing book was practically word for word with the copyrighted book. That case did not involve fair use at all.

The Henry Holt case is similar to the situation at bar in that in that case as well as here, the source of the material is conceded. However, in the Holt case the defendant merely quoted from the copyrighted book. The Court there noted that it is sufficient for an infringement if a material and substantial part was copied even though it be a small part of the whole; and in the Holt case the defendant copied these materials and attributed them to the author of the infringed book in order to assist the defendant in selling its cigarettes. The Court expressly found that the defendant did not copy the material from the copyrighted work to advance in any way human knowledge but for the purely commercial purpose of helping it to sell its cigarettes. We hardly believe that this case has any relevance at all other than the fact that the Court did say that although the defendant acknowledged the source from which the matter was taken does not excuse the infringement but indicates that the defendant did not intend unfair competition.

The Huie case is likewise irrelevant and no one can say that what the Transcript is publishing is merely rewriting of the Wainwright report.

I cannot understand your reference at all to the Bond Buyers case which was a matter of two companies competing and one company stealing the fruits of the others labors and selling them as though they belonged to the pirate.

EXHIBIT J, ANNEXED TO AFFIDAVIT OF ROY L. REGOZIN

I assure you that the Transcript is not looking for litigation and is prepared to do whatever it can do to reasonably accommodate both of the parties. As I indicated to you all that we intend to do is to make references to ideas or opinions expressed in a Wainwright report and I gather from your letter that you do not consider this an infringement.

I have been carefully reading some of the Wainwright reports and a question has been raised in my mind concerning them. I know it has been a fairly common practice for corporate officers to discuss their corporations with analysts and in connection therewith to disclose to the analysts matter not of public record. It strikes me that some of the material in the Wainwright reports is of that nature. If that is so then the right to know doctrine really comes into play as well as other doctrines.

I stand ready to cooperate with you in an effort to work out a reasonable format.

Please advise.

Sincerely yours,

Samuel N Greenspoon

SNG/fd

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

RICHARD A. HOLMAN, being duly sworn, and says:

I am one of the defendants herein, and President of the corporate defendant. I have knowledge of the facts set forth herein except to the extent I indicate that my statements are on information and belief.

1) Although the complaint refers to unfair competition, as well as copyright infringement, there is no unfair competition here. The news accounts published by the Wall Street Transcript give full attribution to plaintiff and to the analyst whose name appears on the research report. At no time does or did the Transcript claim that the account of the report is the product of the Transcript. In its news accounts of reports that have been issued by plaintiff and many others the Transcript shows the date of the original news source report and the length of the original news source report.

2) The Transcript is a weekly newspaper, and has been published every week for some thirteen years. It has been afforded second class mailing privileges by the Post Office and receives newspaper treatment therefrom. It is exempt from New York sales tax as a newspaper. It also has been issued a working press card by the New York City Police.

3) The Transcript's subscribers include colleges, universities, libraries—both public and private—lawyers, accountants, brokers, corporations and others. It is available to the public by subscription or at some newstands.

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4) On the other hand the plaintiff is a broker, specializing in institutional trading in securities. It is not in competition with the defendants nor are the defendants in competition with it.

5) I now turn to the reasons why a temporary injunction should be denied. In brief these are:

A. An injunction has only prospective effect. Hence the plaintiff is seeking to enjoin the Transcript from publishing accounts in the future of research reports not yet written (and hence not yet copyrighted) or any account prepared thereof. Palpably something not yet written cannot enjoy copyright protection. Moreover, it could not be filed with the Patent Office, since not yet written, and hence any suit thereon is premature.

B. To enjoin the defendants from publishing etc. accounts of any such unwritten research reports is to impose a prior restraint upon the press in violating of the First Amendment and of the public's right to know.

C. The news accounts published in the Transcript make only fair use of copyrighted material. We intend to do so in the future in our news reports, comments and criticisms. What the Transcript is really trying to do in its news accounts is to express the opinions, ideas and conclusions of the research report—none of which is copyrightable. The conclusions, ideas and opinions are the gist of what plaintiff seeks to gag or enjoin. On occasion of course no other word than that used in the research report can be utilized. For example, in the CIT digest (see pp. 16-17 of the moving affidavit) the words "short-term interest rate" are used. There is no other language which can be used to describe that matter. And in any event such phrase is commonly used by virtually everyone. In addition, almost all of the factual material in plaintiff's reports is not original and not copyrightable.

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

D. We realize that "fair use" is not a precise term. Certainly fair use can vary depending on circumstances. We pledge however that we will abide by any guidelines laid down by this Court, or any appellate court, in any account of plaintiff's research reports which the Transcript publishes in the future.

E. It has become clear to me that plaintiff is seeking to suppress reporting of the news. In this connection we have tried to meet plaintiff's objections to some earlier accounts we published. We consulted counsel, and counsel then drafted an account of the C.I.T. research report of plaintiff. (See pp. 16-17 of moving affidavit). I know that counsel drafted that account after researching the law and in an effort to meet plaintiff's objections. That is the basis on which the Transcript published the news account which incidentally was delivered to plaintiff's counsel before it was published.

F. To enjoin the account of research reports where, as here, there is no palming off of the research report or appropriation of it as the Transcript's own product, contravenes the freedom of the press and the public's right to know. This is especially important in the context of this case. On information and belief, derived from reading Wainwright's research reports, and admissions in Meyer's affidavit (p. 3), I state that Wainwright is obtaining non-public information from corporate officers and insiders; and this information is then circulated by Wainwright only to its institutional clients in the guise of research reports. It is that limitation of an audience which Wainwright seeks through this Court to maintain. That may well turn out to be asking this Court to assist the plaintiff in violating the Securities Acts.

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

G. On information and belief, the plaintiff does not sell its research reports. What it does, according to my understanding, is to agree to provide research reports, without charge, to institutional investors which supply plaintiff with certain dollar amounts of commissions through trading in securities through the plaintiff. Thus it is highly debatable if Wainwright has any copyrighted protection at all since its research reports are not prepared for sale.

I now turn to a detailed discussion of the facts.

As can be gleaned from the copies of the correspondence annexed to the moving papers, the Transcript was willing to make almost any alteration in the accounts it publishes of the plaintiff's copyrighted material; however, the attorneys for the respective parties apparently could not agree on precisely what the limitations of the fair use doctrine were. Certainly, the Transcript has no desire to interfere with the relationships between the plaintiff and its institutional clients. However, the function of a newspaper is to publish accounts of what people are saying or doing. Certainly then, what the plaintiff was saying could well be newsworthy.

What the Transcript was trying to do was to publish accounts of the ideas, opinions, and conclusions which the plaintiff had set forth in its research reports. The plaintiff's research reports are quite voluminous while the accounts published by the Transcript are very short indeed. Sometimes it is impossible to use any words other than what appear in the research report in order to express the ideas, opinions and conclusions set forth in the research report.

I alluded above to the use of the phrase "short term interest rates". I cannot conceive of any phrase which could be substituted for such phrase, and to put it mildly

such phrase is commonly used in the newspapers and publications and in speeches. In addition, the plaintiff on occasion refers to the name of divisions of a corporation. Obviously any account of what the plaintiff has said could not use different names of the divisions.

In any event, I represent to this Court that the Transcript has never had any intention and certainly will not in the future publish any account of plaintiff's reports other than within the scope of the fair use doctrine. The Transcript will attempt to distill from the research report, the ideas, opinions and conclusions of the research report, and then publish news accounts of these and other non-copyrightable items.

The Transcript is prepared to go further. It appears from the correspondence between counsel attached to the moving papers that the doctrine of fair use is not a rigid, inflexible doctrine, but that is scope varies, depending on the circumstances. The circumstances are here disclosed. The Transcript represents that it will comply with any guidelines laid down by this Court as to what constitutes fair use and in the event of an appeal if the Court of Appeals lays down different guidelines then the Transcript will comply with such guidelines. In short, the Transcript wants only the right, which the law gives it to publish news accounts of the ideas, opinions and conclusions within the scope of the doctrine of fair use, whatever that scope may be.

In connection with the proposed temporary injunction, this is an entirely different matter from a case in which someone is infringing a copyrighted book, for example. There the publisher of the infringing book will, unless enjoined, continue to sell the book and thus continue the infringement from day to day. That is not what plaintiff is really seeking here. Here, the plaintiff seeks to enjoin the defendants from infringing any research report which the plaintiff may write at any time in the future.

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In fact such unwritten research reports could not possibly be copyrighted. Nor could they have been filed with the Patent Office so as to permit the plaintiff to prosecute an action with respect thereto.

Furthermore, any restraint upon publication of accounts of as yet unwritten research reports, would constitute a prior restraint upon publication and the public's right to know which is forbidden under the first amendment. In such cases the Courts are not concerned with the validity or content of that which is to be published in the future; the Courts simply will not enjoin such publication.

I now turn to analysis of the research reports and the news accounts which the Transcript published of such news accounts.

The first news account is a special report dated April 13, 1976 which consists of some seven pages (Exhibit A to complaint). The news account published in the Transcript under date of May 10, 1976, almost a month later, consists of 19 lines containing approximately 152 words. Much of the matter set forth in the special report has no originality and thus is not copyrightable. For example, the earnings for the years 1974 and 1975, the annual dividend rate, the recent price, the 1976 price range to date, and the yield have no originality at all. Thus, there could not conceivably be any impropriety in the news account stating the recent price or the actual earnings per share for 1975. The fact that management of the corporation involved had decided last year to attempt to negotiate the sale of its Fiber Division likewise contains no originality and this is not copyrightable.

The next research report complained about is the basic report dated April 27, 1976 (Exhibit D to complaint); and the news account thereof which appeared in the Transcript of May 17, 1976, approximately three weeks late.

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

This basic report consists of 26 pages and the news account thereof consists of 31 lines consisting of approximately 245 words. Again with respect to actual earnings, current annual dividend rate, current price, 1976 range to date, and yield, are all lacking in originality and thus not copyrightable. Indeed, hardly anything in the commentary part of the basic report which is apparently the part of the report upon which plaintiff relies, has any originality. Thus, benefits derived from paying low wages to non-union employees lacks originality; the so-called planned development of new business between Ohio and the Southeast lacks originality; the fact that the company has had a no lay-off policy in the past lacks originality, and the like.

The next report upon which plaintiff relies is a special report with respect to Monsanto Company (Exhibit F to complaint) which covers ten pages. The news account thereof as published in the Transcript (Exhibit G to complaint) covers 27 lines or approximately 240 words. Again, much of the material in the special report lacks originality, such as the actual earnings for 1974, 1975, the current annual dividend yield, the recent price, the 1976 range to date, the yield, and the statements concerning fully diluted earnings. Obviously, the name of the company involved lacks originality and so does the word "herbicide" which is used to describe certain chemicals.

The next report complained about is a special report on Eastman Kodak and Polaroid Corporation (Exh. H to complaint) which consists of six pages. The news account as published in the Transcript consists of 33 lines containing about 270 words. It is doubtful if any of the material in the special report has any originality at all. The special report is really some kind of a description of the physical aspects of the two competing cameras or of the film used therein and other technical details concerning the two cameras. Certainly, none of this has any originality at all and is thus not copyrightable.

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The next report upon which plaintiff relies is the basic report concerning CIT Financial Corporation (Exhibit J to complaint) which comprises 41 pages. That basic report is dated June 15, 1976 and the news account thereof appeared in the Transcript under date of July 5, 1976 (Exh. L to complaint). The account comprises 36 lines consisting of approximately 275 words. This is the news account which defendant's counsel wrote after consulting opinions of the Court and in trying to meet objections (whether valid or not) posed by the plaintiff. This is the last news account which has been published in any issue of the Transcript. Again, much of the material in plaintiff's report lacks originality. Although plaintiff has attempted to show some purported copying (see pp. 16-17 of Regozin affdvt.) it is perfectly obvious that there is neither copying nor paraphrasing. It is true that the news account used the same names of CIT's divisions as did the plaintiff's report; but obviously the names of these divisions are not copyrightable since they certainly lack originality. Neither do the words "property and casualty insurance divisions" have any originality nor does the phrase "short term interest rates." There just is no similarity at all between the news account and the plaintiff's report other than in the use of names and numbers.

I submit that there was no substantial taking here, either qualitatively or quantitatively. Nothing in the news account goes beyond fair use of original source material for news reporting, comment or criticism.

In any event, the news comments could not possibly have materially reduced the demand for the original copyrighted property and no such claim is even made. In fact, we have received requests for the original reports, which we have not complied with, but instead have referred the party to plaintiff. Plaintiff's claim with

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respect to possible injury appears to be set forth in paragraphs 16, 17 and 18 of Mr. Meyer's affidavit. But these show no reduction in demand whatsoever for the originally copyrighted material. None of plaintiff's 900 clients is shown to have complained at all nor is there any showing that plaintiff lost any commissions because of the publication of the news accounts in the Transcript. Any claimed loss in brokerage business through the publication of the news accounts in the Transcript is not only super-speculative but is well beyond the purpose of copyright protection.

Moreover, there is a substantial time gap between the issuance by plaintiff of its report and the publication of the news account thereof in the Transcript. One would think that investment decisions are made promptly and are not allowed to linger for weeks or months.

The assertion by Mr. Meyer that the news account published in the Transcript gives aid and comfort to plaintiff's competitors is plainly absurd. The brief news account could not possibly give any real information to plaintiff's competitors since it is so cursory and does not provide the basic material set forth in the plaintiff's reports.

The news account does not purport to provide a complete statement of plaintiff's analysis and the allegation that any part of the news account inaccurately reflects plaintiff's reports is simply not true. It is a contradiction in terms for plaintiff to say on the one hand that the news account gives aid and comfort to plaintiff's competitors and on the other hand damages the plaintiff because the news account is not "complete and accurate".

Certainly, if anything, the news account giving publicity to plaintiff would more likely induce customers to want to deal with the plaintiff. This publicity places the plaintiff's name before the general public and could conceivably result in inquiries by potential customers to the

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

plaintiff. As I previously pointed out we have directed requests for full original reports to plaintiff.

I submit that the distribution of the news account served the public interest in the free dissemination of information. The Transcript is a newspaper; and its duty is to get before the public what others are doing and thinking. This duty and obligation transcends the copyright laws.

This duty and obligation is even more important here because the plaintiff concedes (Meyer affdvt. par. 6)—

> "Basic Reports are always based upon interviews with one or more company officials. A Special Report generally concerns a major development at a company, even leading to a change in the earnings projected by Wainwright."

So the plaintiff is using inside information not generally available to the public. The plaintiff seeks to limit that inside information to a chosen few customers and does not want that inside information generally known. That is designed to give an insider benefit and advantage to a chosen few; and that violates the public disclosure requirements of the Securities acts. So plaintiff is asking this Court for assistance in providing confidential insider information to a select few so that this select few can have an improper advantage over the general public. An insider is not permitted to take advantage of confidential or inside information and neither is he permitted to disclose on a selective basis such inside or confidential information about a company; and moreover, neither is the plaintiff permitted to disclose or to act upon such inside or confidential information so that only a selected few may have the same.

Thus, unquestionably, the news accounts published by the Transcript serve the public interest in the free dissemination of economic information.

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It is also obvious that the plaintiff's report requires and utilizes prior materials dealing with the same subject matter. Thus it is conceded by Mr. Meyer that these reports contain a review of the company's historical operating record and contain sections concerning management, accounting policies, company and industry business characteristics, and other matters, all of which are gleaned from prior materials.

I respectfully submit that all of the news accounts which have heretofore appeared in the Transcript of plaintiff's reports meet any and all of the tests laid down for fair use. But when the copyright laws clash with the first amendment, the copyright laws must yield even further.

The copyright laws are simply not designed for the purpose of restricting news and information to a very wealthy few.

The Transcript does not publish the news accounts of plaintiff's reports for pecuniary gain as such. To the contrary it publishes such news accounts as part of its activity in bringing the news to the public. Its advertisements make that clear.

The advertisements state in plain language "Get all this timely news"; and "pinpointed account of heavyweight reports"; and "Ask for it [the Transcript] at your Public Library (Exh. A to mov. affdvt.).

And other ads state "you have a right to know" (Exh. C to mov. affdvt.).

Plaintiff's reports, like other matters which are said and done, are the essence of news. The large dailies quote from and paraphrase copyrighted reports such as plaintiffs on a regular basis. They do that because those dailies, like the Transcript, have the duty and obligation to report the news, without fear and favor. That is so because freedom of the press is justified by the public's right to know. Here plaintiff is seeking the aid of the Court to suppress the news and deny to the public the right to know.

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

These news accounts of plaintiff's reports are merely a small part of the total content of the Transcript. It publishes speeches, news articles, press conferences, editorials, articles relating to art, furniture, and the entire range of human activity. Thus it cannot be said that any particular items of news causes any particular segment of society to purchase the Transcript.

Moreover, the plaintiff is not trying to protect any proper interest in the copyrighted material. What plaintiff is trying to protect is its claimed commission business; but that is not a legitimate or proper interest protectible under the copyright laws. And plaintiff seeks to protect its commission business by stifling the press.

The attempt here to protect plaintiff's commission business—which does not from anything in this record need protection—through the guise of the copyright laws—is an attempt to utilize the copyright laws for improper purposes. This is made evident by the fact that the Transcript has published news accounts of hundreds of other copyrighted research reports issued by something in excess of 100 different firms. Nonetheless, plaintiff is the only one who has brought suit to suppress the publication of news accounts of its research reports. This would indicate that the other firms realize that these news accounts do not impair their commission basis; and even if they did, that would not be protectible under the copyright laws. And further that there is a serious question as to whether or not these research reports are copyrightable at all. Indeed, many of the firms forward to the Transcript their copyrighted research reports so that the Transcript can publish news accounts thereof.

There is no evidence that the research reports were reproduced for sale. Indeed, it appears from the moving papers that the opposite is true; they were reproduced

Affidavit of Richard A. Holman, Sworn to July 16, 1976, in Opposition to Motion for Temporary Injunction

for purposes of obtaining commissions business resulting from the trading of securities with the plaintiff. I suggest therefore that plaintiff has no statutory right to obtain a copyright of these reports since they are clearly not lectures or similar production or a dramatic, musical or dramatico-musical composition; nor are these research reports a motion picture photoplay; or a photograph; or a motion picture; or a work of art or a plastic work or drawing.

The only copies of the news accounts which the Transcript has are those in the copies of the newspaper not sold and the typewritten news account sent to the printer. These news accounts are reproduced by photo-offset and the plate is then destroyed. Hence there are no plates or mats in existence.

The application for a temporary injunction should be denied in all respects.

(Sworn to by Richard A. Holman, July 16, 1976.)

Supplemental Affidavit of Roy L. Regozin, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROY L. REGOZIN, being duly sworn, deposes and says:

1. I respectfully submit this supplemental affidavit in response to the affidavit of Richard A. Holman sworn to July 16, 1976, filed by defendants in the captioned matter, to point out a misstatement of fact on page 4 of Mr. Holman's affidavit.

2. With reference to defendants' abstract of Wainwright's Basic Report dated June 15, 1976 concerning C.I.T. Financial Corporation, Mr. Holman states that it "was delivered to plaintiff's counsel before it was published" (Holman Aff't p. 4). This is simply not correct. See paragraphs 11 through 13 and paragraph 16 of my affidavit sworn to July 9, 1976 and filed herein. We did not see a copy of the abstract before it was published in the July 5, 1976 issue of *The Wall Street Transcript*.

3. Mr. Greenspoon's letter to me dated June 25, 1976, a copy of which is attached as Exhibit H to my July 9, 1976 affidavit, refers to his "digest" of the report concerning C.I.T. Financial Corporation but does not disclose the contents of the "digest" nor was a copy of the "digest" enclosed with Mr. Greenspoon's letter.

(Sworn to by Roy L. Regozin, July 21, 1976.)

Supplemental Affidavit of Robert L. Meyer, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. MEYER, being duly sworn, deposes and says:

1. I respectfully submit this supplemental affidavit in support of Wainwright's motion for a preliminary injunction against the defendants herein, to point out misstatements of fact contained in the affidavit of Richard A. Holman, sworn to July 16, 1976 and filed by defendants herein.

2. Mr. Holman states in his July 16, 1976 affidavit that "plaintiff does not sell its research reports" (p. 5, ¶G) and that "[t]here is no evidence that the research reports were reproduced for sale" (p. 15). I very clearly state in my affidavit sworn to July 9, 1976 and filed herein that "Wainwright does not give away its Research Reports" (¶17) and that the "Research Reports are, in my opinion, the reason Wainwright is able to obtain and keep its institutional clients" (¶16). As indicated on page 3 of Mr. Regozin's letter dated June 30, 1976 to Mr. Greenspoon, a copy of which is attached as Exhibit I to Mr. Regozin's July 9, 1976 affidavit filed herein, Wainwright sells its Research Reports for brokerage commissions as well as for cash.

3. The practice of selling research for "soft" (*i.e.*, commission) dollars is well recognized in the securities industry. In fact, Congress recently enacted Section 28(e)

of the Securities Exchange Act of 1934 in order to protect fiduciaries and money managers, in certain instances, where they choose to "pay-up" for research, i.e., elect to pay higher commissions in return for receipt of research reports. Clients of Wainwright are willing to pay Wainwright's commission rates, rather than do business with so-called "discount" houses, primarily as a result of their desire to obtain the valuable Wainwright Reports.

4. Thus, Wainwright does indeed "sell" its Research Reports for commission dollars. If the amount of commission business generated by a particular client drops below an acceptable level, Wainwright no longer supplies its Research Reports to such client without an additional charge. If the client still wishes to receive the Reports, it must pay Wainwright cash in lieu of commission dollars for them.

5. In addition, upon request Wainwright sells individual Research Reports to non-clients.

6. Wainwright has also entered into a test marketing agreement with Find/SVP pursuant to which Find/SVP offers for sale copies of Wainwright's Research Reports selected by them. Wainwright receives a portion of the price paid to Find/SVP for such Reports.

7. There can be no question that Wainwright sells its Research Reports; in fact, such sales are the life blood of Wainwright's business.

8. I note that within the past year, two Divisions of the Securities and Exchange Commission have on separate occasions requested to be placed on Wainwright's mailing list for its Research Reports. In both instances

Supplemental Affidavit of Robert L. Meyer, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction

Wainwright indicated that it would be willing to sell its Research Reports to the Securities and Exchange Commission, but would not expect to provide the Reports free of charge. In both instances Wainwright was advised that the policy of the Securities and Exchange Commission and budgetary considerations precluded the purchase of research reports.

9. I submit the foregoing information to insure that the record is clear, but I understand that it is not necessary to sell copies of a Report in order to obtain copyright protection for it, but rather that all that is necessary is that the Reports be published within the meaning of the Copyright Act with the required copyright notice on each copy published.

10. The next matter I wish to respond to is one which does not appear to be at all germane to an action for copyright infringement and unfair competition, but which has been raised by defendants. Mr. Holman states that "plaintiff is using inside information not generally available to the public." (Holman Aff't, p. 12). This simply is not true. Wainwright is well aware of its obligations under the securities laws and, in particular, of the need for full and timely disclosure of corporate information to all concerned on a concurrent basis. Wainwright does not use "inside information" in its Research Reports.

11. As I indicate in paragraph 9 of my July 9, 1976 affidavit, the final draft of a Basic Report is circulated "to members of the management of the company or companies concerned for comments." The purpose of this procedure is to insure that there are no factual misstatements in the Report.

Supplemental Affidavit of Robert L. Meyer, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction

12. I will not respond to the legal conclusions set forth on pages 7 through 10 of Mr. Holman's July 16, 1976 affidavit, concerning the copyrightability of Wainwright's Research Reports, as this matter is covered in our Memorandum and Reply Memorandum. However, I do wish to make it clear for the record that Wainwright's Special Report dated April 30, 1976, concerning Eastman Kodak and Polaroid Corporation, sets forth the results of experiments paid for by Wainwright, involving the types of cameras and film discussed in the Special Report.

13. Because of the crucial importance of Wainwright's Research Reports to Wainwright's operations (see ¶¶ 4 and 16 of my July 9, 1976 affidavit), it is most important to Wainwright that its Reports be presented to the public in forms acceptable to it. Defendants published Wainwright's name and the name of the securities analysts who prepared the Research Reports in connection with abstracts which, according to Mr. Holman, do not "purport to provide a complete statement of plaintiff's analysis" (Holman Aff't, p. 11). Wainwright, not defendants, should be the judge of what versions of its Research Reports should be released to the public. That is one reason why Wainwright copyrighted its Research Reports.

14. It is not a "contradiction in terms" as alleged by Mr. Holman (Holman Aff't, p. 11) that defendants' publication of abstracts of Wainwright's Research Reports damages both Wainwright's goodwill and its reputation. Damage is done to Wainwright's goodwill because Wainright's competitors in the brokerage business and potential institutional clients, as well as the general public, can make investment decisions on the basis of the projections, analysis and conclusions set forth in the abstracts of Wainwright's Research Reports published by

Supplemental Affidavit of Robert L. Meyer, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction

defendants without feeling any obligation or need to come to Wainwright, and because Wainwright's institutional clients may give business to other brokerage houses because they are upset about the publication of the abstracts by defendants. At the same time, Wainwright's reputation is damaged because the projections, analysis and conclusions set forth in the Research Reports depend upon the assumptions made and stated therein and to the extent such assumptions, projections, analysis and conclusions are only partially disclosed or not disclosed at all in the abstract, persons who critically read the abstract can misinterpret the viewpoint of the securities analyst as expressed in the Research Report and conclude that the analyst did an incompetent job. Whether persons rely on the abstracts for their investment decisions, or form unfavorable opinions about Wainwright or the securities analysts on the basis of the contents of the abstracts, Wainwright is clearly damaged by the publication of such abstracts.

15. Mr. Holman asserts that Wainwright is the only person who has sued defendants for copyright infringement in connection with the publication of abstracts of research reports, although "the Transcript has published news accounts of hundreds of other copyrighted research reports issued by something in excess of 100 different firms." (Holman Aff't, pp. 14, 15) Mr. Holman's statement is irrelevant to a determination of the merits of Wainwright's claims herein. However, what it does indicate is that Wainwright is different from most other brokerage houses in that it depends almost exclusively upon its research operations for its continued existence . (See ¶4 of my July 9, 1976 affidavit.) The crucial importance to Wainwright of its Research Reports clearly establishes the need for the relief requested herein.

Supplemental Affidavit of Robert L. Meyer, Sworn to July 21, 1976, in Support of Motion for Temporary Injunction

CONCLUSION

For the foregoing reasons, as well as those set forth in my July 9, 1976 affidavit and the other papers filed by plaintiff herein, Wainwright respectfully requests that a preliminary injunction be issued prohibiting the defendants during the pendency of this action from publishing, selling, marketing, or otherwise disposing of any copies of any abstracts of copyrighted Wainwright Research Reports and from infringing in any manner Wainwright's copyrights in the Research Reports, copies of which are attached to the Complaint herein as Exhibits A, D, F, H and J.

(Sworn to by Robert L. Meyer, July 21, 1976.)

Letter From Eaton, VanWinkle & Greenspoon, Dated July 26, 1976, and Enclosure in Opposition to Motion for Temporary Injunction.

EATON, VAN WINKLE & GREENSPOON

600 Third Avenue

New York, N. Y. 10016

July 26, 1976

Hon. Morris E. Lasker
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Wainwright v. Wall Street Transcript
76 Civ. 3053 (MEL)

Dear Judge Lasker:

We enclose herewith what we consider clearly permissible matters for a newspaper to publish in connection with Wainwright's copyrighted material. In this connection, we do not believe that these permissible matters are the outer limits of fair use or fair comment but are clearly within such outer limits. We have not attempted to define the outer limits because we find the limits so elusive.

In this connection Wainwright's counsel suggested that in order to publish a news account of copyrighted material there had to be independent work performed by the newspaper, presumably meaning research outside of the copyrighted material itself. We do not believe that that is an accurate statement of the law, since many, if

Letter From Eaton, VanWinkle & Greenspoon, Dated July 26, 1976, and Enclosure in Opposition to Motion for Temporary Injunction

not most, book reviews touch only on the book itself and do not go outside of the book. In other words, independent work, if such be required, is the reading of the book or the Wainwright copyrighted report.

We respectfully submit that no injunction at all should issue because we do not believe that Wainwright has introduced sufficient evidence to meet the test laid down by your Honor in the *Worth* case.

Moreover, we believe that none of the news accounts published by the Transcript has gone beyond the elusive limits of fair use or fair comment.

I am sending a copy of this letter and of the enclosure to Wainwright's counsel, which they will probably receive before this letter is delivered to the Court.

Respectfully yours,
SAMUEL N. GREENSPOON

SNG/fd
Enclosure
cc: Cashill, Gordon & Reindel, Esqs.

List of Permissible Matters

1. The Transcript's news account may be a summary of the Wainwright copyrighted report, with brief quotations therefrom. The word "summary" is used herein as defined in the Oxford Universal Dictionary (p. 2076) as containing or comprising the chief points or the sum and substance of a matter.

Letter From Eaton, VanWinkle & Greenspoon, Dated July 26, 1976, and Enclosure in Opposition to Motion for Temporary Injunction

2. The Transcript may distill from the copyrighted report its ideas, themes and conclusions and publish the Transcript's distillation thereof, together with a quote or paraphrase of limited portions to support the Transcript's distillation thereof.

3. The Transcript may utilize any and all commonly used expressions even though contained in the research report; e.g. such expressions as "short-term interest rates"; "profit and loss"; "earnings"; "price-earnings ratio"; and similar commonly used expressions.

4. The Transcript may publish any and all facts set forth about the company or companies or industry which were included in the research report, provided such facts originate with the company or companies or industry involved or which are otherwise taken from public records by Wainwright; including any expression contained in these public records which are contained in the Wainwright report.

5. The Transcript's account shall include the name of Wainwright as issuer of the research report, the name of the actual author if appended to the report, the date of the report, the name of the company or companies mentioned in the report, the name or names of any subdivision of the company mentioned in the report, the price of the stock, the exchange on which it is traded.

SAMUEL N. GREENSPOON

Letter From Cahill, Gordon & Reindel, Dated July 27, 1976, in Support of Motion for Temporary Injunction.

CAHILL GORDON & REINDEL

Eighty Pine Street

New York, N. Y. 10005

Telephone 212-825-0100

Telex 127068

July 27, 1976

Re: H. C. Wainwright & Co. v. Wall Street Transcript Corporation and Richard A. Holman
76 Civ. 3053 (MEL)

Dear Judge Lasker:

On behalf of plaintiff, H. C. Wainwright & Co., we respectfully submit the enclosed proposed Preliminary Injunction pursuant to your request at the hearing of Wainwright's motion for a preliminary injunction held on July 22, 1976.

The proposed Preliminary Injunction enjoins publication by defendants of the abstracts of Wainwright's copyrighted Research Reports which are at issue herein, of any additional abstracts of any of Wainwright's copyrighted Research Reports presented in the format of the feature "Wall Street Roundup" of *The Wall Street Transcript*, and of any other infringements of Wainwright's copyrights in its Research Reports.

We submit that such an injunction is necessary to protect Wainwright against future infringements by defendants during the pendency of this action, particularly in

Letter From Cahill Gordon & Reindel, Dated July 27, 1976, in Support of Motion for Temporary Injunction

light of the contents of Mr. Greenspoon's letter to you dated July 26, 1976, a copy of which we received this morning.

Defendants once again assert that all of their abstracts at issue herein are protected by the fair use doctrine and now contend that reading a copyrighted Wainwright Research Report is sufficient "independent work" to bring an abstract of such Report within the limits of fair use. Such a contention is patently absurd. If it were correct, anyone who read a book could publish another version of it without infringing the author's copyright, contrary to Section 1(b) of the Copyright Act, 17 U.S.C. §1(b).

It has been the law since 1897 that merely taking from a copyrighted work constitutes infringement regardless of any similarity of language. *West Pub. Co. v. Lawyers' Cooperative Pub. Co.*, 79 F. 756 (2d Cir. 1897), cited at pages 18-19 of plaintiff's Memorandum filed on July 9, 1976. At most, defendants' abstracts constitute derivative works which, under Section 7 of the Copyright Act, 17 U.S.C. §7, can only be produced with Wainright's consent as the owner of the copyrights in its Research Reports.

It is significant that the only example of fair use cited by Mr. Greenspoon in his July 26, 1976 letter is that of a book review. A book review involves critical evaluation of the contents of the book and the style in which it is written. This is the element of independent effort which can bring a book review within the limits of fair use of the book. Defendants, on the other hand, eschew any intent or attempt to critically evaluate Wainwright's Research Reports. Defendants merely publish abstracts of such Reports.

Letter From Cahill Gordon & Reindel, Dated July 27, 1976, in Support of Motion for Temporary Injunction

It is now clear beyond all doubt that defendants intend to persist in pressing their right to publish abstracts of Wainwright's copyrighted Research Reports although they are aware of Wainwright's copyright claims. Under these circumstances, a preliminary injunction is required to protect plaintiff during the pendency of this action.

Should your Honor desire to receive proposed Findings of Fact and Conclusions of Law, we shall be pleased to submit them to assist the Court.

A copy of the enclosed proposed Preliminary Injunction together with a copy of this letter is presently being delivered by hand to Samuel N. Greenspoon, Esq., of the firm of Eaton, Van Winkle & Greenspoon, counsel for defendants.

Respectfully submitted,

/s/ ROY L. REGOZIN

The Honorable Morris E. Lasker
United States District Judge
U. S. Court House
Foley Square
New York, New York 10007

cc: Samuel N. Greenspoon, Esq.

Answer, Dated July 28, 197[illegible]

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The Answer

First Defense

1. Defendants deny each and every allegation of the complaint except as expressly admitted or otherwise denied as follows:

Paragraph of Complaint	*Specific Response*
1, 2, 3, 4	Admit
5 and 6	Deny that they have knowledge or information sufficient to form a belief as to the truth thereof.
7	Deny that they have knowledge or information sufficient to form a belief as to the truth of the first two sentences.
8, 9 and 10	Deny that they have knowledge or information sufficient to form a belief as to the truth thereof.
12	Admit that a copy of a Special Report is attached to the complaint as Exhibit A.
14	Admit that a copy of a Certificate is made a part of Exhibit A to the complaint.
15 and 16	Deny on information and belief.

Answer, Dated July 28, 1976

Paragraph of Complaint	*Specific Response*
17	Admit that a copy of defendants' news account is attached to the complaint as Exhibit B.
18	Admit that a copy of plaintiff's letter dated May 27, 1976 is attached to the complaint as Exhibit C.
21	Admit that a copy of a Basic Report is attached to the complaint as Exhibit D.
23	Admit that a copy of the Certificate is made a part of Exhibit D to the complaint.
24 and 25	Deny on information and belief.
26	Admit that a copy of defendants' news account is attached to the complaint as Exhibit E.
27	Admit that a copy of Wainwright's letter is attached to the complaint as Exhibit C.
30	Admit that a copy of a Special Report is attached to the complaint as Exhibit F.
32	Admit that a copy of the Certificate is made a part of Exhibit F to the complaint.
33 and 34	Deny on information and belief.
35	Admit that a copy of defendant's news account is attached to the complaint as Exhibit G.
36	Admit that a copy of plaintiff's letter is attached to the complaint as Exhibit C.
39	Admit that a copy of the Special Report is attached to the complaint as Exhibit H.

Answer, Dated July 28, 1976

Paragraph of Complaint	*Specific Response*
41	Admit that a copy of the Certificate is made a part of Exhibit H to the complaint.
42 and 43	Deny on information and belief.
44	Admit that a copy of Wainwright's letter is attached to the complaint as Exhibit C.
45	Admit that a copy of defendants' news account is attached to the complaint as Exhibit I.
48	Admit that a copy of the Basic Report is attached to the complaint as Exhibit J.
50	Deny that they have knowledge or information sufficient to form a belief as to the truth of the last sentence thereof.
51 and 52	Deny on information and belief.
53	Admit that on or about June 23, 1976 counsel for defendants telephoned counsel for Wainwright and disclosed in the course of the conversation that he was preparing or had prepared an account of Wainwright's Basic Report concerning CIT Financial Corporation which counsel for defendants asserted was well within the boundaries of fair use or fair comment.
54	Admit that a copy of plaintiff's June 24, 1976 letter is attached to the complaint as Exhibit K and that the said letter set forth plaintiff's position that anything published by the defendants of a copyrighted

Answer, Dated July 28, 1976

Paragraph of Complaint	*Specific Response*
	Wainwright research report constituted an infringement of Wainwright's copyright therein.
55	Admit that a copy of defendants' news account is attached to the complaint as Exhibit L.

Second Defense

2. The news accounts published by the defendants of plaintiff's purported copyrighted material are protected by the First Amendment to the United States Constitution and any restraint against the publication of said news accounts constitutes a prior restraint barred by the First Amendment to the United States Constitution.

Third Defense

3. On information and belief, the plaintiff receives confidential and insider information from companies which is not made available to the public generally; and the plaintiff utilizes this confidential and insider information in its alleged copyrighted material; and the plaintiff is here seeking to deprive the general public of this information which the general public has a right to know; and the plaintiff is asking this Court to aid it in violation of the Securities Acts; and thus has unclean hands and may not recover herein.

Fourth Defense

4. The news accounts published by the defendants are well within the limits of fair use and fair comment, and inform the public of matters as to which there is a general interest.

Answer, Dated July 28, 1976

Fifth Defense

5. Plaintiff's research reports utilize matters and facts which are in the public domain; and which, on information and belief, are gleaned from public records and much of which is a mere repetition of the artistic expression contained in documents which are in the public domain and which are public records; and accordingly the research reports are not copyrightable in whole or in part.

Sixth Defense

6. The research reports are not published for sale and hence are not copyrightable at all by reason of Sections 12 and 5 of 17 U.S.C.; and on information and belief the plaintiff is seeking to utilize the copyright laws for the suppression of information of value to the general public and for purposes not authorized by the copyright laws.

Seventh Defense

7. The defendants publish their news accounts of plaintiff's research reports with full attribution to the plaintiff and to the actual author thereof; are not in competition with the plaintiff; and accordingly there is no unfair competition.

EATON, VAN WINKLE & GREENSPOON
Attorneys for Defendants
By SAMUEL N. GREENSPOON
A member of the firm
600 Third Avenue
New York, New York 10016
867-0606

Opinion of Court, Lasker, J., Dated August 19, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Appearances:

Cahill, Gordon & Reindel, Esqs., 80 Pine Street, New York, New York 10005, Attorneys for Plaintiff, Of Counsel: Stephen A. Greene, Esq., Roy L. Regozin, Esq., Ira A. Finkelstein, Esq., Helene Fromm, Esq.

Eaton, Van Winkle & Greenspoon, Esqs., 600 Third Avenue, New York, New York 10016, Attorneys for Defendants.

LASKER, D. J.:

H. C. Wainwright & Co. is engaged in the securities business as a broker. As an important adjunct to its brokerage business, Wainwright has for nearly forty years provided financial research for its clients. The roster of those it currently serves numbers more than 900 including most major banks, insurance companies, mutual funds, investment counselors, and pension funds in a variety of countries. 90% of Wainwright's revenues and even more of its profits are earned from the research which it distributes, and to perform which it retains a staff of 80 professionally trained persons.

Wainwright regularly furnishes its clients with detailed and analytical "Research Reports" relating to some 30 industrial areas and 275 industrial, financial, utility and railroad corporations which represent a "broad cross-section of the economy of the United States, and, as measured by capitalization, account for the bulk of the market value of a typical institutional equity portfolio."[1]

Wainwright copyrights each of its reports by registration with the Register of Copyrights, affixing the classic

[1]Affidavit of Robert L. Meyer, July 9, 1976.

"(c)", its name and the year at the bottom of the first page of each report and adding the notice "All rights reserved. No portion of this report may be reproduced in any form without prior written consent." There is no doubt that if Wainwright's reports are copyrightable—a point which Wall Street Transcript Corporation questions—they have been copyrighted.

The Wall Street Transcript is published weekly. Among its features is the "Wall Street Roundup" which consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers. It advertises itself to the financial world as a purveyor of institutional research reports in abstract form. The announcements appearing in the widely read and respected Barron's for October 27, 1975 and July 5, 1976 are typical. They advise the reader that the Transcript will furnish him:

> "WHAT leading investment houses across the country are saying to their big institutional clients —the big banks, insurance companies, funds, and important foreign clients." (October 27, 1975) (Regozin Affidavit, Page 3)
>
> ". . . now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, The Wall Street Transcript brings you a fast-reading, pinpointed account of heavyweight reports from the top institutional research firms.
>
> "Our Wall Street Roundup will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each year; and index every bit of it for you, immediately and continuously, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." (Regozin Affidavit, Page 2)

For several months[2] prior to the commencement of this suit, the Transcript has published a number of abstracts of Wainwright reports. These include the reports on FMC Corp., Overnite Transportation, Monsanto Company, Eastman Kodak, Polaroid Corporation and C.I.T. Financial Corporation. Promptly after learning of the publications, Wainwright protested in writing to the Transcript that they violated Wainwright's copyrights. Counsel for the parties attempted responsibly but unsuccessfully to reach agreement as to their respective rights. This suit followed.

Wainwright claims that the publication of the Transcript constitutes actual or substantial copying of its reports in violation of 17 U.S.C. §1 *et seq.*, as amended, (1970) and moves for a preliminary injunction restraining the Transcript from infringing Wainwright's copyrights. The Transcript argues that: 1) Plaintiff's research reports are not subject to copyright; 2) its abstracts furnish the public information which it has "a right to know", and that they are accordingly protected by the First Amendment; 3) Wainwright is not entitled to protection because by this suit it seeks to suppress "inside information" in violation of the rule established by such cases as *S. E. C. v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2d Cir. 1968), and 446 F. 2d 1301 (2d Cir. 1971), *cert. denied*, 404 U. S. 1005 (1972); and 4) under the doctrine of "fair use" the Transcript has the right to publish abstracts of Wainwright's reports. We find none of the Transcript's contentions to be sound and accordingly grant Wainwright's motion for preliminary relief.

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[2]It is not clear from the moving papers precisely when the Transcript first published abstracts of Wainwright's reports. The earliest date indicated is "May 1976." (Regozin Affidavit, Paragraph 5.)

Opinion of Court, Lasker, J., Dated August 19, 1976

I.

Citing such decisions as *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970); *Norman v. Columbia Broadcasting System*, 333 F. Supp. 788 (S.D.N.Y. 1971), and *Dellar v. Samuel Goldwyn*, 150 F. 2d 612 (2d Cir. 1945), the Transcript argues that:

> ". . . matter which lacks originality and [includes] facts as such are not copyrightable"

and adds

> "nor are plaintiff's conceptions, viewpoints or ideas embodied in its research report within the scope of copyright protection."

The difficulty with the Transcript's position is that the proposition of law which it states correctly does not apply to the facts of the case. Wainwright's reports, detailed excerpts of which appear below, clearly do not lack originality, and its original analyses and conclusions are without question entitled to copyright protection. The decisions on which the Transcript relies do not hold that such material may be freely copied, as the Transcript claims, but rather, as is explained in detail in part IV below, that a copyright does not grant its holder a monopoly of discussion of the underlying subject matter. Thus, for example, while an historian may not simply rewrite a copyrighted book, he is free to cover the same subject matter in a book growing out of his own independent research. The Transcript does not claim to have conducted any independent research in preparation of its abstracts. To the contrary, it blandly asserts the unsupportable proposition that ". . . independent work, if such be required, is the reading of the . . . Wainwright copyrighted report."[3]

[3]Letter of Samuel M. Greenspoon, attorney for the Transcript, to the Court dated July 26, 1976.

Such a theory, if validated, would make a shambles of the copyright law; copyright would dissolve upon the mere reading of the protected material, and protection would be a chimera. Neither the Constitution nor the statute contemplates such evanescent or worthless protection.

Nor is there merit to the Transcript's subordinate arguments that Wainwright's reports do not meet the requirements of the statute because they are neither sold, nor works not reproduced for sale within the meaning of 17 U.S.C. §12, or that they do not fall within "Class (a)" of 17 U.S.C. §5 in which their certificates of registration classify them. The affidavit of Robert L. Meyer, a partner in Wainwright and its Director of Research, clearly establishes at Paragraphs 2-8 that furnishing the reports is part of the service for which Wainwright charges a cost to its clients. Moreover, the statute does not require a literal sale, but may be satisfied by a lease, loan or gift of the copyrighted material. See, e. g., *Bartok v. Boosey & Hawkes, Inc.*, 523 F. 2d 941, 945 (2d Cir. 1975). Even advertising handouts and illustrations in a catalogue are protected. *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239 (1903); *Lin-brook Builders Hardware v. Gertler*, 352 F. 2d 298 (9th Cir. 1965).

There is no greater merit to the claim that the reports are not "books" within the meaning of subdivision (a) of 17 U.S.C. §5. If they are not—and they appear to be in every respect except the most literal—they are "composite works" or "other compilations". Even greeting cards are registrable under Class (a), *Roth Greeting Cards v. United Card Co.*, 429 F. 2d 1106, 1110 (9th Cir. 1970), as are machine-scorable answers sheets to tests. *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971). Moreover, the copyright office's grants of certificates of registration to the plaintiff indicate that it construes the statute to cover the reports.

II.

The Transcript asserts that it is a newspaper and that in furnishing its readers abstracts of business and industrial reports it is merely giving them the news. More particularly, it claims that the First Amendment, especially as its reach has been construed in the recent decisions of the Supreme Court in *Buckley v. Valeo,* U. S. , 44 U.S.L.W. 4127 (January 30, 1976), and *Virginia State Board of Pharmacy v. Virginia Consumer Council,* U. S. , 44 U.S.L.W. 4686 (May 24, 1976), assures the public's "right to know" the information contained in the Wainwright reports.

The Transcript's ingenious designation of the reports as news is faulty. While the fact of Wainwright's issuing a report on a particular company or industry, and perhaps whether it was favorable or unfavorable, bullish or bearish, may be news, the precise contents of the report are not news—at least if the term is meant to indicate that the material, as is the case of true "news," is in the public domain. The original analytical contents, the style, impressions, estimates, assessments and appraisals of the reports are protected, as is the particular expression of the facts. The public has a right to know the facts, but does not have a right to know them in the particular form in which an author assembles and expresses them.

As to the Transcript's claim that the First Amendment protects the publication of its abstracts, one could dispose of the argument as Judge Croake did in *McGraw-Hill v. Worth Publishers Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971) by saying:

> "Defendants' First Amendment argument, in so far as it is distinguishable from their claim of fair use, can be dismissed as flying in the face of established law. See U. S. Const. Art 1, §8; 17 U.S.C. §§ 1, *et seq.*, 112."

Judge Zampano put it nearly as concisely in *Robert Stigwood Group Ltd. v. O'Reilly,* 346 F. Supp. 376, 383 (D. Conn. 1972), *aff'd,* No. 72-1826 (2d Cir., May 30, 1973):

> "The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law. Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud, among many other, would constitutionally fall."

A further comment is in order. The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation.

III.

Relying solely on the decisions in *S. E. C. v. Texas Gulf Sulphur Co., supra,* the Transcript contends that "it is a violation of law to utilize insider information in such a way that the general public is excluded therefrom and only plaintiff's customers receive the benefits therefrom."

Even if this characterization of the *Texas Gulf* rule, a case relating only to the purchase of securities, were not over generalized, it would not be applicable to the case at hand.

In the first place nothing in the record supports the unfounded claim that inside information is used in preparation of or is included in the reports. The allegation of such use springs full blown from, and only from, the Transcript's memorandum in opposition, and is categorically denied in Wainwright's reply memorandum with

references to Meyer's affidavit at Paragraph 10, which in turn refers to various reports which are exhibits to the complaint. Nothing contained in them appears to support the Transcript's claim and the Transcript has filed no affidavit on the motion, nor furnished any material controverting Wainwright's categorical denial of the use of inside information.

Furthermore, there is serious doubt whether, under the holding in *Blue Chip Stamps v. Manor Drug Stores,* 421 U. S. 723 (1975), defendants have standing to assert the defense of the violation of the securities laws which they claim.

IV.

> " 'Fair use' is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." Ball, Copyright & Literary Property 260 (1944).

The Transcript's major position is anchored in the theory of fair use.

The leading case on the subject in this Circuit is *Rosemont Enterprises, Inc. v. Random House, Inc.,* 366 F. 2d 303 (2d Cir. 1966). There Judge Moore explained at page 307 that:

> "The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts' U. S. Const. Art. 1 §9. (Citations omitted) To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and in-

dustry' *Berlin v. E. C. Publications, Inc.*, 329 F. 2d 541, 544 (2d Cir. 1964)."

The classic instances in which courts have permitted authors to use excerpts from a copyrighted work without the consent of the copyright owner are those of literary criticism and parody of the copyrighted work, history and biography.

> "The cases and commentaries attempting to define the quicksilver content of 'fair use,' although varying and overlapping in their definitions, appear to agree that at least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantive taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce the demand for the original copyrighted property? (3) . . . [D]oes the distribution of the material serve the public interest in the free dissemination of information? And (4) does the preparation of the material require the use of prior materials dealing with the same subject matter." *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S. D. N. Y. 1970).[4]

[4]Similar factors, declared to be a codification of existing law are included in §107 of S. 1361, The General Revision of the Copyright Law pending before Congress. They are:

1) the purpose and character of the use

2) the nature of the copyrighted work

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work.

Judged by these criteria the Transcript's abstracts do not constitute a fair use of Wainwright's reports. The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d'etre to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutly substantial in quantity.

The following examples are typical of the takings, and illustrate particularly well the remarkable extent of copying:

Abstract	*Special Report*
". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."	"The first of the "surprises" alluded to above that strengthen 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p. 1)
"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."	"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)
• • •	• • •

Opinion of Court, Lasker, J., Dated August 19, 1976

Abstract	*Special Report*
". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."	". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . . (p. 4)
". . . the company could wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings."	". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings." (p. 6)
". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."	". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)
• • •	• • •
"Trantum estimates that Overnite Transportation will earn $3 a share this year, compared with $2.03 in 1975 and $2.78 in 1974."	"Earnings (Years ending Dec. 31) Actual 1974 . $2.78 per share Actual 1975 . $2.03 per share Estimated 1976. $3.00 per share (p. 1)
• • •	• • •

Opinion of Court, Lasker, J., Dated August 19, 1976

Abstract	*Special Report*
"Productivity gains are being realized, he believes, and a favorable earnings trend should be maintained this year, with additional gains in 1977 as a result of recent additions to route authority and plans for developing new business between Ohio and the Southeast."	"Productivity gains are finally being realized. . . . Furthermore, with the recent additions of route authority and the planned development of new business between Ohio and the Southeast, the carrier should be positioned to extend the favorable earnings trend into 1977." (p. 1)
"As for the longer term, Trantum says management must take several steps to improve its uneven earnings performance since 1971. He says it must expand its operating authority to cut its dependence on the Southeast, put greater stress on sales and refine and tighten its system of revenue and expense controls."	"Before Overnite can be expected to significantly improve on uneven earnings performance since 1971, this analyst believes it necessary for management to take several steps: (1) expand operating authority to reduce dependence on the Southeast, (2) place greater emphasis on sales, and (3) refine and tighten the company's system of revenue and expense controls." (p. 1)
"Tratum says progress is apparently taking place in all three areas, but he says it's too early to define the effects of the company's actions on long-term prospects."	"While progress is apparently being made in all three areas, it is still too early to precisely define the effects of these actions on the long-term outlook." (p. 1) (Regozin Affidavit, Pages 8-11)

There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services. Furnishing its reports to its clients is an especially valued feature which distinguishes Wainwright's services from other brokers'. The Transcript's infringements impair the value of Wainwright's copyrighted material by making its contents available to other brokerage houses with which Wainwright competes. Moreover the infringements impair Wainwright's ability to publish its own abstracts or to authorize others to do so.

Nor is the distribution of the abstracts necessary to serve the public interest in the free dissemination of information. There is no question here of denial of public access. The Transcript is free to prepare and issue its own reports based on its own research and without use of copyrighted material. However, "[t]he second . . . publisher cannot 'as here' bodily appropriate the research of its predecessor." *Rosemont Enterprises Inc. v. Random House Inc., supra,* at 310; and "No public need appears which would justify defendants' saving themselves time and trouble at the expense of plaintiffs' copyright." *Marvin Worth Productions v. Superior Films Corp., supra,* at 1275.

Finally, while the preparation of the Transcript's material may "require the use of prior materials dealing with the same subject," such a need frees the Transcript to get such prior materials from the source only—that is, to do its own research—not to lift passages wholesale from Wainwright's independent product under the guise of merely repeating facts or business terms or furnishing news to the public.

In sum, the Transcript's copyings are not protected as fair use of the material.

The true nature of the Transcript's abstracts is that of a derivative work. Derivative works are an approved genre under 17 U.S.C. §7, but may be copyrighted or published only with the consent of the publisher of the underlying work, which of course has not been given here.

V.

Wainwright has without question made a prima facie showing of infringement of its copyright. The defenses asserted by the Transcript have not been established. In the circumstances Wainwright is entitled to a preliminary injunction to protect its copyrighted property and to shield it from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public.

This Memorandum Opinion constitutes the Court's findings of facts and conclusions of law.

The motion for preliminary injunction is granted and a decree is being filed concurrently with the filing of this Memorandum Opinion.

Dated: New York, New York
August 19, 1976.

MORRIS E. LASKER
U. S. D. J.

Preliminary Injunction, Dated August 19, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

This case came on to be heard on plaintiff's motion for a preliminary injunction filed on the 9th day of July, 1976, and the Court having considered the complaint, the affidavits and supplemental affidavits of Robert L. Meyer and Roy L. Regozin and the memoranda of law submitted in support of said motion and the affidavit of Richard A. Holman and the memoranda of law submitted in opposition thereto, and having heard the arguments of counsel for the plaintiff and counsel for the defendants at the hearing of said motion, and it appearing to the Court after due deliberation that plaintiff has established a prima facie case that defendants have infringed plaintiff's copyrights in its Research Reports and that there is a substantial risk that defendants unless restrained will continue to do so during the pendency of this action, to the irreparable injury of the plaintiff, and that the issuance of this order will not irreparably injure defendants, and the Court having made and filed its findings of fact and conclusions of law, it is

ORDERED that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from:

(a) publishing, selling, marketing or otherwise disposing of any copies of (i) their abstracts (copies of which are attached to the complaint herein as Exhibits B, E, G, I and L) of plaintiff's copyrighted Research Reports (copies of which are attached to the complaint herein as Exhibits A, D, F, H and J) ~~or (ii) any other infringements of plaintiff's copyrights in said Research Reports~~; and

M.E.L.

(b) publishing, selling, marketing or otherwise disposing of any copies of (i) any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature "Wall Street Roundup" of *The Wall Street Transcript* ~~or (ii) any other infringements of plaintiff's copyrights in its Research Reports~~; and it is

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, shall deliver up to be impounded during the pendency of this action all copies or drafts of any abstracts of plaintiff's copyrighted Research Reports in their possession or under their control, and all plates, molds, and other matter for making such abstracts; and it is further

ORDERED, that plaintiff shall keep in full force and effect its present bond in the sum of $1000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained *hereby, as* posted herein pursuant to the temporary restraining order issued by this Court on July 9, 1976.

M.E.L.

Dated: New York, New York
August 19, 1976

s/ MORRIS E. LASKER
U. S. D. J.

Notice of Appeal, Dated September 17, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

H. C. WAINWRIGHT & Co.,

Plaintiff,

against

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Defendants.

76 Civ. 3053 (MEL)

SIRS:

Please take notice that the defendants above named, Wall Street Transcript Corporation and Richard A. Holman hereby appeal to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York preliminarily enjoining the defendants, pending the determination of this action, from publishing, selling, marketing or otherwise disposing of any copies of certain accounts of plaintiff's copyrighted reports specified in the order; from publishing, selling, marketing or otherwise disposing of copies of any other unspecified accounts of unspecified reports copyrighted by plaintiff; and directing defendants to deliver up for impounding all copies or drafts of accounts of unspecified reports copyrighted by

Notice of Appeal, Dated September 17, 1976

plaintiff; which order was entered in this action on August 19, 1976; and said defendants appeal from each and every part of said order as well as from the whole thereof.

Dated: New York, N. Y.
September 17, 1976

Yours, etc.

EATON, VAN WINKLE & GREENSPOON
Attorneys for Defendants
By SAMUEL N. GREENSPOON
A member of the firm
600 Third Avenue
New York, New York 10016
867-0606

To:

Cahill, Gordon & Reindel, Esqs.
Attorneys for Plaintiff
80 Pine Street
New York, N. Y. 10005
825-0100

Notice of Motion for Reargument and Other Relief, Dated August 30, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please take notice that on the memorandum in support of motion for reargument, the undersigned will move this Court at a Term for Motions, to be held before Honorable Morris E. Lasker, in Room 1903, United States District Courthouse, Foley Square, New York, New York, at 10:00 A.M. on September 9, 1976, or as soon thereafter as counsel can be heard, pursuant to General Rule 9(m), for an order granting reargument and upon such reargument vacating the temporary injunction dated August 19, 1976, or modifying or clarifying the same, as more particularly set forth in said memorandum in support of motion for reargument.

Please take further notice that upon the annexed affidavits of Richard A. Holman, Samuel N. Greenspoon and Myron Kandel each sworn to August 30, 1976, the undersigned will further move this Court, at the time and place aforesaid, for an order pursuant to Rule 8 FRAP and the general equity powers of this Court, staying or suspending the said injunction pending appeal therefrom, or in the alternative increasing substantially the amount of

Notice of Motion for Reargument and Other Relief, Dated August 30, 1976

the bond to be filed by the plaintiff; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
August 30, 1976

Yours, etc.

EATON, VANWINKLE & GREENSPOON
Attorneys for Defendants
By .....
A member of the firm
Office & P. O. Address
600 Third Avenue
New York, New York 10016
867-0606

To:

Cahill, Gordon & Reindel, Esqs.
Attorneys for Plaintiff
80 Pine Street
New York, N. Y. 10005
944-7400

Affidavit of Richard A. Holman, Sworn to August 30, 1976, in Support of Motion for Other Relief.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

RICHARD A. HOLMAN, being duly sworn, deposes and says:

I am one of the defendants herein and President of the corporate defendant.

I submit this affidavit in support of defendants' application for:

1) a stay or suspension pending appeal;

2) reargument (see memorandum)

3) increase in the bond to $50,000.

1) *As to a stay pending appeal:*

Rule 8 Federal Rules App. Proc. requires application for a stay or suspension pending appeal to be made to the District Court in the first instance except in rare instances which do not appear to be applicable here.

No possible damage can inure to the plaintiff if the injunction is stayed or suspended during appeal. Although the Court stated (Opinion pp. 13-14):

> "There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services",

there is no evidence to support that belief. If any of plaintiff's clients had reduced its use of plaintiff's services, because of the said publication, or had even indicated an

intent to do so, we can be sure that plaintiff would have presented a letter from such client to that effect. But there is none.

Moreover, plaintiff concedes that it has no evidence that the publication has in any way reduced (materially or otherwise) any demand for its services. Thus the Meyer affidavit (sworn to July 9, 1976) concedes (par. 18:)

> "It may be impossible for us to determine how much brokerage business Wainwright lost because of the publication by *The Transcript* of abstracts of Wainwright's Research Reports. We have no idea whether any of our institutional clients gave business to other brokerage houses because they were upset about the publication of the abstracts in *The Transcript,* nor do we have any idea how many potential customers used the abstracts as the basis for investment decisions, but did not request Wainwright to act as their broker in connection with such investment decisions."

Hence there is no evidentiary support of the Court's statement about reduction in demand for plaintiff's services, and plaintiff concedes it has no evidence thereof.

The Court noted that there was no evidence as to when the Transcript began to publish news accounts of plaintiff's reports. Actually the Transcript began to publish such news accounts in November 1974 and has published about 100 news accounts of plaintiff's reports. Yet plaintiff failed to state the name of a single client which had cut down or terminated the use of plaintiff's services for any reason much less because of the publication of the news accounts. Striking evidence that plaintiff has not been damaged.

On the other hand the damage to defendants if the injunction is not stayed or suspended pending appeal can be

Affidavit of Richard A. Holman, Sworn to August 30, 1976, in Support of Motion for Other Relief

enormous. Thus the injunction requires defendants to deliver up for impounding:

> "all copies or drafts of any abstracts of plaintiff's copyrighted Research Reports."

Defendants have no such copies or drafts except as published in the newspaper. As so published they consist of less than one-tenth of one percent of the contents of the newspaper. If the entire newspaper must be impounded, then the damage to the defendants is enormous. Moreover, the impounding of copies of the newspaper constitutes a prior restraint on the publication of 99.90% of news as to which plaintiff has no interest at all.

We do not know what is meant by the impounding clause, and as part of our motion for reargument we are seeking clarification thereof. If it covers all of the copies of all of the newspapers, then it clearly goes too far. On the other hand, it would be a relatively simple matter to block out the news account of plaintiff's report in the event that defendants sell copies of the newspapers. That should be sufficient protection for plaintiff.

The public interest must also be considered. According to plaintiff its reports are of benefit to its clients. If so, they would be of benefit to the general public. The Transcript is sold to some 500 libraries scattered throughout the United States. Hence, virtually the entire United States population would have access to the Transcript's news accounts instead of the selected few. We submit that the public's interest should not be overlooked where only plaintiff's private interests are at stake. (See Exhibit A annexed)

Moreover, we believe that the Court's rulings both on the fair use and first amendment questions raise serious issues as to which there is no Court of Appeals guidance.

Affidavit of Richard A. Holman, Sworn to August 30, 1976, in Support of Motion for Other Relief

Indeed, as we shall show in our memorandum the rulings of the Supreme Court seem to be in conflict with this Court's rulings.

Accordingly, we respectfully submit that the injunction should be stayed or suspended during appeal. We will do all we can to expedite the appeal.

2) *As to reargument:*

The matters or controlling decisions which we believe this Court has overlooked are set forth in our memorandum. (See Rule 9[m] General Rules).

3) *As to the bond:*

We submit that the $1,000 bond is grossly inadequate. Thus, e. g., the impounding clause if it affects the newspapers themselves as contrasted with the news accounts, will cause enormous damage to the defendants. Accordingly, we submit that the bond should be increased substantially or else the impounding clause be modified so as to merely require that the newspapers need not be impounded but if sold then the news account be deleted.

I respectfully submit that the motion should be granted in all respects.

(Sworn to by Richard A. Holman, August 30, 1976.)

Affidavit of Samuel N. Greenspoon, Sworn to August 30, 1976, in Support of Motion for Other Relief.

State of New York,
County of New York, ss:

SAMUEL N. GREENSPOON, being duly sworn, deposes and says:

It is my recollection that on the oral argument the Court indicated that if it granted the injunction it would stay the same so that defendants could prosecute an appeal.

(Sworn to by Samuel N. Greenspoon, August 30, 1976.)

Exhibit A, Annexed to Foregoing Affidavits of Richard A. Holman and Samuel N. Greenspoon.

H. C. WAINWRIGHT & Co.

ESTABLISHED 1868

June 4, 1976

NOTICE TO OUR CLIENTS

An increasing number of products published by our Research and Economic-Investment Departments have been quoted and otherwise utilized by various media in recent months, and we would like to take this opportunity to again acquaint our clients with our policy in this matter. We do not now and have never made our products available to the media except in very isolated cases as background material for serious research purposes. As an indication of our resolve, beginning two months ago we began copyrighting all of our material through the Copyright Office of the Library of Congress. Each of our reports since then contains the copyright notice as well as the words:

> "All rights reserved. No portion of this report may be reproduced in any form without prior written consent."

We have already begun to protect our copyright through legal channels and we intend to vigorously continue such efforts. We ask for your cooperation in keeping our reports within your organizations, and your understanding in our attempts to maintain the exclusivity of our work.

ROBERT L. MEYER
Director of Research

Affidavit of Myron Kandel, Sworn to August 30, 1976, in Support of Motion for Other Relief.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

MYRON KANDEL, being duly sworn, deposes and says:

I was the financial editor of the New York Herald Tribune from 1964 to 1966; I was the editor of the New York Law Journal from 1966 to 1968; I was the editor and publisher of the Wall Street Letter from 1969 to 1973; I am now the editor and publisher of Review of the Financial Press and I am currently President of the Society of American Business and Economic Writers.

I am familiar with brokers' reports, having read many of them over the years. Brokers' reports constitute important news for the business and financial community; they can have a significant economic or financial impact. In fulfilling its obligations to provide the public with comprehensive news and information it is essential for the business and financial press to be able to report on the contents of brokers' reports on a consistent continuing basis.

(Sworn to by Myron Kandel, August 30, 1976.)

Affidavit of Roy L. Regozin, Sworn to September 7, 1976, in Opposition to Motion for Other Relief.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

ROY L. REGOZIN, being duly sworn, deposes and says:

1. I respectfully submit this affidavit on behalf of plaintiff H. C. Wainwright & Co. ("Wainwright") in response to defendants' motions for a stay pending appeal of the Preliminary Injunction entered herein on August 20, 1976 and for modification of the terms of such Preliminary Injunction.

2. At the hearing on Wainwright's order to show cause for a temporary restraining order held July 9, 1976, the Court inquired whether any witnesses would be presented at the hearing on Wainwright's motion for a preliminary injunction. Counsel for defendants and counsel for Wainwright each stated that no witnesses would be called. Counsel for defendants also stated that very few back issues of *The Wall Street Transcript ("The Transcript")* are sold and represented to the Court that no copies of the issues of *The Transcript* containing the abstracts attached as exhibits to the Complaint would be distributed by defendants pending determination of Wainwright's motion for a preliminary injunction.

3. At the hearing on the motion for a preliminary injunction, held in Chambers on July 22, 1976, the Court indicated that Wainwright's copyrights appeared to have been infringed by defendants, and that the Court was inclined to issue an injunction. The Court requested counsel for Wainwright and counsel for defendants to submit proposed preliminary injunctions. At no time, to the best of my recollection and the recollections of Ira A.

Affidavit of Roy L. Regozin, Sworn to September 7, 1976, in Opposition to Motion for Other Relief

Finkelstein, Esq. and Helene Fromm, Esq., who were present at the July 22 hearing, did the Court intimate, much less indicate, that if a preliminary injunction were issued, the Court would stay the injunction pending an appeal by defendants, as suggested by Mr. Greenspoon in an affidavit sworn to August 30, 1976 (Holman Aff't, p. 5). Ms. Fromm, Mr. Finkelstein and I each reviewed the notes we took during the hearing and found no reference to any suggestion by the Court that a stay of a preliminary injunction might be granted pending appeal.

4. Defendants did not submit a proposed preliminary injunction as requested by the Court, nor did defendants submit any comments concerning the proposed preliminary injunction submitted and served by Wainwright.

5. The proposed preliminary injunction submitted and served by Wainwright on July 27, 1976, as modified by the Court, was entered on August 20, 1976.

(Sworn to by Roy L. Regozin, September 7, 1976.)

Affidavit of Robert L. Meyer, Sworn to September 7, 1976, in Opposition to Motion for Other Relief.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

ROBERT L. MEYER, being duly sworn, deposes and says:

1. I respectfully submit this affidavit in response to defendants' motion for a stay pending appeal of the Preliminary Injunction entered in this action on August 20, 1976.

2. Mr. Holman asserts that there is no evidence to support the belief that publication by defendants of abstracts of Wainwright's Reports may materially reduce the demand for Wainwright's services (Holman Aff't sworn to August 30, 1976, p. 2). This is simply not correct. It is clear that the abstracts contain statements of projections, analyses and conclusions set forth in Wainwright's Reports and that the abstracts are sold to competitors and potential customers of Wainwright. Mr. Holman now states that "virtually the entire United States population" has access to the abstracts (Holman Aff't sworn to August 30, 1976, p. 4). Nothing more need be said. Defendants have made the contents of Wainwright's Research Reports available without cost to competitors, potential customers and the general public. We would not expect our clients to inform us when they give business to other brokerage houses. We certainly would not expect to be advised as to the use made of the abstracts by our competitors or by potential customers.

3. Mr. Holman states that since November 1974 *The Wall Street Transcript* has published approximately 100 "news accounts" of Wainwright's Reports (Holman Aff't sworn to August 30, 1976, pp. 2-3). Wainwright attempted, in a variety of ways, to dissuade defendants

from continuing to publish abstracts of its Reports. When it became apparent that the defendants could not be dissuaded by Wainwright, even by Wainwright's refusing to permit its securities analysts to participate in the "roundtable" discussions conducted by defendants, Wainwright in April 1976 began to copyright its Reports under the Copyright Act. What happened thereafter is already a matter of record (see my affidavit and supplemental affidavit sworn to July 9 and July 21, 1976, respectively and the affidavit and supplemental affidavit of Roy L. Regozin sworn to July 9 and July 21, 1976, respectively). The present action was commenced by Wainwright after all attempts to resolve the matter between the parties had failed.

4. Mr. Holman's discussion on page 2 of his August 30 affidavit with regard to paragraph 18 of my July 9 affidavit completely misses the mark. My point was that there is no way for Wainwright to determine how much brokerage business it lost because of the publication by defendants of abstracts of Wainwright's Research Reports. Wainwright's inability to quantify the damage caused by the publication of the abstracts makes the need for an injunction clear.

5. Given the intransigent position taken by defendants in this action with regard to their asserted right to continue to publish abstracts of Wainwright's copyrighted Research Reports, the granting of a stay of the Preliminary Injunction would be extremely prejudicial to Wainwright.

CONCLUSION

Wainwright respectfully requests that defendants' motion for a stay pending appeal of the Preliminary Injunction entered in this action be denied.

(Sworn to by Robert L. Meyer, September 7, 1976.)

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before:

Hon. Morris E. Lasker, District Judge.

New York, October 1, 1976,
11:30 a.m.

Appearances:

Cahill, Gordon & Reindel, Esqs., Attorneys for plaintiff By: Roy L. Regozin, Esq., Ira A. Finkelstein, Esq., of Counsel.

Eaton Van Winkle Greenspoon & Grutman, Esqs., Attorneys for defendants By: Samuel Greenspoon, Esq., of Counsel.

Also Present:

Richard A. Holman.

The Court: There is a motion for reargument and for other relief that is really for modification of the terms of the injunction made by the defendants. I have read with interest and care the 22-page memorandum of Mr. Greenspoon and the 21-page papers in opposition.

I do not agree with counsel for the defendant that there is a basis for altering the decision of the court. I do not find that I overlooked any material facts or disregarded or, so far as I can see, misconstrued any of the law put before me or relied upon in my earlier decision.

Therefore, the motion, insofar as it is a motion for reargument, is denied.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

Insofar as your applications for relief relating to modification of the injunction, I would be glad to discuss them, although I have some views in the matter already.

These boil down, as I recall, to three. The first is what I will call the scope of the injunction, whether it should apply to future publications of Wainwright or not as distinct from Wainwright's existing reports.

The second matter is the question of impoundment which is presently ordered in the injunction.

And the third is the question of the amount of bond furnished by the plaintiff upon the preliminary injunction.

As far as the first question is concerned, I believe that the court does have the power to enjoin the defendants from infringing on any copyrighted material of the plaintiff substantially or identically in the form of the reports as they have been issued to date.

Of course, this injunction is not intended to cover any material that theoretically might be issued by Wainwright of a very different nature, but there is nothing in the record to indicate that Wainwright intends to or is likely to issue any such material during the pendency of this proceeding. If I were to be assured by the defendants that they would not, that they would voluntarily refrain from infringing or copying or using the material of Wainwright in the way they have used it during the pendency of this action, of course I would be agreeable to eliminating that requirement from the injunction. But I understand, and do not criticize the defendants for believing, as I think they do, that they have a right in good faith to do this and my understanding is that they feel that under the circumstances they can't give me the assurance that they won't do it unless the court enjoins them from doing so.

Is that correct, Mr. Greenspoon?

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

Mr. Greenspoon: What we would is we want to publish what we call these accounts, but we are prepared to do it within any guidelines. That's the basic problem.

The Court: There was an earlier time, the last time we met, I think, when I suggested to you as counsel to the defendants that you make proposals as to guidelines, and, indeed, I guess you did. They simply didn't seem to me to be sound in accordance with my view of the plaintiff's rights and what the law is.

I don't really know of anything that would have changed that since the time you made those suggestions. I think we really ought to play it straight.

You know, you can go to the Court of Appeals right away and they may disagree with me, but let's find out. If it is the law, it is the law, and if it is that's just the way the cookie will have to crumble, so to speak.

On the question of impoundment, Mr. Regozin did indicate in his memorandum that he would be agreeable to trying to work out some method there that was not unduly a burden on you and I don't want to put an undue burden on you either, I just want to see that this stuff doesn't circulate. Any arrangement that you could propose that will assure that without messing up your business is fine as far as I am concerned.

Mr. Greenspoon: I think what I had indicated, your Honor, was this, that these things are very small parts of lengthy newspapers and I indicated that we would be prepared and we agree that to the extent of the injunction we would not—if we sold these newspapers—

The Court: We are talking about the back issues.

Mr. Greenspoon: The point is not the question of selling them, but to take four or five hundred copies of five issues, we are talking about 2500 newspapers, and these things weigh, I don't know, a pound apiece, maybe more, we are talking about over a ton of paper.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

What I had suggested was that we simply, if we would keep the newspapers down there and if somebody happened to buy one, which is possible, block out—

The Court: You can cut it out, I suppose.

Mr. Greenspoon: Either cut it out or block it out in some fashion.

This newspaper is not set up like some newspapers, where they have cuts and plates and all that, we destroy the type immediately.

The Court: Subject to hearing whether Mr. Regozin has any further suggestions, I would be satisfied to modify the injunction something like that, particularly in view of the fact he has earlier said that he would try to work it out too. What I would want, however, would be that there would be some written instruction given by the defendant to whoever is in charge of sales of past issues to be sure that they are alerted in advance so that this material doesn't go out negligently, however innocent it might be.

Mr. Greenspoon: I think we blocked out certain copies, didn't we? Didn't we do that?

The Court: How do you do that?

Mr. Holman: You cover it over. You paste over it or ink it through, either way.

The Court: I guess inking it through would be better. We are not talking about national security here, so I suppose nobody is likely to peek under the pasted over material, except out of curiosity, perhaps, but I suppose inking it through would be better.

Mr. Regozin: I agree inking it through would be preferable. The only comment I would have would be it wouldn't be sales we are concerned with but any distribution.

The Court: What do you do with back issues?

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

Mr. Holman: We keep them. People order sometimes a whole year's set back and we have some things pending now, with schools, libraries.

The Court: You say you have four or five hundred?

Mr. Greenspoon: Yes.

The Court: How many of those do you expect to be sold?

Mr. Holman: Not many. Maybe at this point would be 10 or 20.

The Court: Yes, it must be down to the minimum now. I will ask you to propose a modification of the injunction on that point then.

Mr. Regozin: Just for the record, your Honor, in answer to one of our interrogatories the defendants indidicated they retain approximately 250 copies.

The Court: The other thing, in the light of that proposition, do we have any trouble about the bond?

Mr. Greenspoon: Well, if I reverse this injunction, and I will be frank about it, I will be very confident I will certainly get it severely modified, yes, I don't think $1000, I think my services, and I am entitled to counsel fees, are worth $25,000 to reverse this injunction, if I do. I think they ought to put up that bond to secure my legal fees in that amount.

The Court: Aren't they good for it?

Mr. Greenspoon: These people?

The Court: Yes.

Mr. Greenspoon: I don't know. In the state courts, unfortunately, I am not too sure of the rule in the federal courts, our damages are limited to the face amount of the bond. I am not too sure the federal rule isn't the same.

The Court: I don't think it is, but at the same time, in order to avoid question, I think $1000 is on the low side in view of the nature of the controversy.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

I certainly do not mean to sponsor Mr. Greenspoon's estimate of the value of his own services, but I would say they are worth more than $1000.

If you wish to be heard on this, you may, but I have a figure in mind which is $5000, which I think is appropriate under the circumstances.

Mr. Regozin: We would not object to that, your Honor.

The Court: I will increase the bond to $5000.

Mr. Greenspoon, why don't you prepare a form of modified injunction, serve it on Mr. Regozin, and he can submit a counterorder if he wants to.

Mr. Greenspoon: I do have one problem if the judgment is served because I don't see your Honor's initials on the strike-through—on page 2. That's the one. There is no initial there and I wasn't sure.

The Court: No, the initials are here.

Mr. Greenspoon: May I be heard for a moment on subdivision (b) of your judgment and also on item L of subdivision (a)?

The Court: L?

Mr. Greenspoon: Yes.

The Court: I think you mean small i.

Mr. Greenspoon: Yes, it is under i, but it is a capital L.

The Court: Yes.

Mr. Greenspoon: Taking up the second one, that which I gather is the future. As I understand that provision of the judgment, I just want to be very clear about that. If Wainwright writes one of these special reports a month from now, it isn't even copyrighted as of today.

The Court: That's right.

Mr. Greenspoon: Obviously, it isn't even filed. You can't bring a proceeding on an uncopyrighted piece of paper which has not been filed with the office.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

The Court: I don't know what you mean by that. Of course the terms of B(1) specifically are limited to copyrighted material.

Mr. Greenspoon: Sure, but that copyrighted material isn't in existence now.

The Court: I agree.

Mr. Greenspoon: The law is very clear that until the copyrighted material is actually filed, you can't bring a proceeding on it. So what we are faced here with is an injunction on a matter where they would be barred from even suing on at this time.

The Court: It seems to me you have rehearsed this argument a number of times, Mr. Greenspoon.

Mr. Greenspoon: Yes, I know.

The Court: I don't know why we differ so, but we do, and I don't propose to change that.

Mr. Greenspoon: On L of the first item, as I understand your Honor's opinion—

The Court: When you talk about L, do you talk about reference to the capital L?

Mr. Greenspoon: Yes. As I understand your Honor's opinion, you say in effect the fact that Wainwright publishes one of these things is something that could be published, that's news, even perhaps the conclusions which Wainwright draws or recommendations which Wainwright makes are likewise in the same category, but your Honor goes on to say that the contents, meaning, I take it, the artistic expression of the writer—

The Court: Or their reasons that are illustrations of the research they have done or the results of the research they have made.

Mr. Greenspoon: Are protected.

The Court: Yes.

Mr. Greenspoon: If that is so, then L is certainly not subject to—

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

The Court: I don't remember what L is.

Mr. Greenspoon: L is the one I drafted and I don't use a single word they use, not one word, except for one expression. I used one expression they used and that's short term interest rates. I defy anyone to utilize—

The Court: I am altogether confused by this.

Mr. Greenspoon: They have five reports, A, D, F, H and J. We have five abstracts, B, G, i, L and K.

L is entirely different from B, G, i and L—there is nothing in L which compares to J. I will take Mr. Regozin's very affidavit.

The Court: Let me look at L so I know what we are talking about.

Mr. Greenspoon, you could have saved us some of this trouble if when the injunction was served, you could have pointed these things out.

Mr. Greenspoon: I take the position that none should be granted, of course.

Mr. Regozin, on page 16—

The Court: What is Exhibit L?

Mr. Regozin: That's the abstract of Wainwright on CIT Financial Corporation.

The Court: Of course, all we are talking about anyway here—I mean, I took this simply to be a description of material that was attached here and not to characterize it as better or worse or anything else, that your abstracts as a group, you were enjoined from publishing.

Mr. Greenspoon: Sure, but if one abstract as they call them, does not infringe upon their basic report, then it should not be enjoined.

On page 16—

The Court: I don't know what you mean by page 16.

Mr. Greenspoon: Of Mr. Regozin's affidavit, he sets forth what he says are the exact things which we for example, on the left, he has abstract—

The Court: I see.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

Mr. Greenspoon: There is absolutely no comparison between—

The Court: What you are saying is you don't think that this particular item, that is, Item L—

Mr. Greenspoon: Falls within your opinion.

The Court: You may be right. I haven't studied that one for that purpose.

I wonder if it is so important that we have to spend time on it now.

Mr. Greenspoon: It is important.

The Court: Why?

Mr. Greenspoon: Because if I knew what your Honor's views were on this one, then I have guidelines.

The Court: I am not prepared to sit here without having an opportunity to think about it or to see why you claim that this is different from the others. I don't know what to say at the present time. If you wish to move furtner to modify the injunction to eliminate L on grounds that you set forth, not at any great length, and Mr. Regozin make his comments in answer, I will be glad to give it a good faith consideration.

I think really it is peripheral at the moment because it still leaves all the rest here. It leaves the injunction and everything else and I would assume that now that we have got these major items straightened out and there is not going to be a change of the decision that you want to go ahead and appeal and find out what the law is.

Mr. Greenspoon: I have already appealed.

The Court: You have?

Mr. Greenspoon: Yes.

The Court: Then I really don't know that further effort is seriously in order until the Court of Appeals lets me know.

Mr. Greenspoon: I will have to withdraw that appeal. I talked to Carlin last night.

Transcript of Mirutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

The Court: Because the motion for reargument was pending?

Mr. Greenspoon: No, because if there is the slightest modification I have to appeal again.

The Court: But you will do that?

Mr. Greenspoon: Yes, I will.

The Court: If you want to move for still further modification, OK.

I think that's the only way I can leave it. I just don't know what more I can do. I tried as much as I can by writing an opinion, discussing the matter with you I don't know how many times on the record and in other ways, including disagreement with some of the things that you have proposed to give you my view of what the law is, and I don't think I can do it much more effectively, but I will always consider seriously anything you put before me.

Mr. Greenspoon: That I am sure.

I don't know, to be frank about it, maybe I am in a better position on appeal, leaving it in there.

The Court: You probably are. If they reverse me on item L—

Mr. Greenspoon: Then I am going to collect all the bond, you see, for my legal fees. You see, Holman has no money to pay me. I have got to look to them.

The Court: At least I have improved your prospects.

I think that's it and I will expect to receive a proposed order.

Mr. Greenspoon: Very good, sir.

I assume that the way to do it would be to incorporate everything in the preceding order and just change the two paragraphs rather than have two separate pieces of paper.

The Court: I think so, too.

Mr. Greenspoon: Your Honor, we had made an application for a stay because the rule requires us to make the application in the District Court first.

Transcript of Minutes of Argument on Motion for Reargument and Other Relief, October 1, 1976

The Court. The application for a stay is granted for a period of five days so that you can apply to the Court of Appeals for a stay.

Mr. Regozin: May I ask you, your Honor, does that mean they are totally unrestrained for five days from publishing anything regarding Wainwright?

Mr. Greenspoon: We won't publish anything in the five days.

The Court: On condition they don't publish anything in the five days.

Mr. Greenspoon: I just have to do this as a matter of form before I do this.

The Court: I don't want to stop you from applying to the Court of Appeals.

Thank you all.

Mr. Greenspoon: Thank you, your Honor.

Superseding Preliminary Injunction, Dated October 12, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The Court entered a Preliminary Injunction in this action on August 20, 1976 and defendants filed motions for reargument and for modification of the terms of such Preliminary Injunction on August 30, 1976. The Court having considered the aforesaid motions, the affidavits of Richard A. Holman and Myron Kandel and the memorandum of law submitted by defendants in support of their motion for modification and their motion for reargument, respectively, and the affidavits of Robert L. Meyer and Roy L. Regozin and the memorandum of law submitted by plaintiff in response thereto, and having heard counsel for the defendants and counsel for the plaintiff concerning the manner in which the Preliminary Injunction should be modified, and it appearing to the Court after due deliberation that it would be appropriate to modify and clarify in certain respects the provisions set forth in the Preliminary Injunction previously entered herein and to restate its terms in their entirety, and it still appearing to the Court after due deliberation that plaintiff has established a prima facie case that defendants have infringed plaintiff's copyrights in its Research Reports and that there is a substantial risk that defendants unless restrained will continue to do so during the pendency of this action, to the irreparable injury of the plaintiff, and that the issuance of this order will not irreparably injure defendants, and the Court having determined that there is no need to modify in any respect its findings of fact and conclusions of law set forth in its Memorandum Opinion previously filed herein, it is

Superseding Preliminary Injunction, Dated October 12, 1976

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from:

(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript*, respectively; and

(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature "Wall Street Roundup" of *The Wall Street Transcript*; and it is further

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from selling, circulating or otherwise disposing of any copies of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript* unless, prior to any such distribution of any such copy of any such issue, the abstract of plaintiff's copyrighted Research Report contained therein on page 43,669, 43,689, 43,789, 43,845 and 44,163 thereof, respectively, is inked out or otherwise rendered illegible in its entirety, and defendants shall provide written instructions to this effect to their personnel having access to copies of such issues and shall post copies of such instructions in prominent places

in the area or areas in which copies of such issues are stored by or on behalf of defendants and in the area or areas in which copies of back issues of *The Wall Street Transcript* are prepared for delivery or mailing by or on behalf of defendants; and it is further

ORDERED, that plaintiff shall file within five days from the date of entry hereof and keep in full force and effect a bond or bonds in the total sum of $5,000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained hereby; and it is further

ORDERED, that upon entry of this Preliminary Injunction, the Preliminary Injunction entered herein on August 20, 1976 shall have no further force or effect.

Dated: New York, New York
October 12, 1976

s/ MORRIS E. LASKER
U. S. D. J.

Amended Notice of Appeal, Dated October 15, 1976.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please take notice that defendants, above named, Wall Street Transcript Corporation and Richard A. Holman, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York entered in this action on October 12, 1976, which order superseded the prior preliminary injunction entered on August 20, 1976 and which order preliminarily enjoined the defendants, their officers, agents, servants, employees and attorneys and all persons acting in concert with them or on their behalf, pending the determination of the action, from publishing, selling, marketing or otherwise disposing of any copies of accounts of specified copyrighted research reports; from publishing, selling, marketing or otherwise disposing of any copies of any other account of any research reports written and copyrighted by the plaintiff in the future; and further enjoined the defendants, pending determination of this action, from selling, circulating or otherwise disposing of any copies of five specified issues of the defendants' newspaper unless there is obliterated therefrom the account of specified copyright research reports;

and granted other relief to the plaintiff; and the said defendants appeal from the entire preliminary injunction as well as from each and every part thereof.

Dated: New York, N. Y.
October 15, 1976

EATON, VAN WINKLE, GREENSPOON & GRUTMAN

Attorneys for the Defendants
By Samuel N. Greenspoon
600 Third Avenue
New York, New York 10016
867-0606

To:

Clerk of the United States District Court
Southern District of New York

Cahill, Gordon & Reindel, Esqs.
Attorneys for Plaintiff
80 Pine Street
New York, N. Y. 10005
825-0100

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

WAINWRIGHT
VS
WALL STREET
TRANSCRIPT

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

BERNARD S. GREENBERG being duly sworn,
deposes and says that he is over the age of 21 years and resides at 162 E 7th street, NY, NY

That on the 15th day of February, 1977 at

he served the annexed Joint Appendix upon

Richard A. Holman, 120 Wall street, NY, NY

Cahill Gordon & Teindel, 80 Pine street, NY, NY

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 15th day of feb, 1977

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Bernard S Greenberg